

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1933

400

No. 5992

ROBERT K. WILLIAMS, APPELLANT,

vs.

SAMUEL RUBENSTEIN AND PAULINE RUBENSTEIN.

No. 5993

FLORENCE E. MYERS, APPELLANT,

vs.

SAMUEL RUBENSTEIN AND PAULINE RUBENSTEIN.

AND

No. 5994

JOHN MYERS, APPELLANT,

vs.

SAMUEL RUBENSTEIN AND PAULINE RUBENSTEIN.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 26, 1933.

PRINTED AUGUST 15, 1933.

Court of Appeals of the District of Columbia

APRIL TERM, 1933

Nos. 5992, 5993, 5994

ROBERT K. WILLIAMS, FLORENCE E. MYERS, AND
JOHN MYERS, APPELLANTS,

vs.

SAMUEL RUBENSTEIN, APPELLEE.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5992.

ROBERT K. WILLIAMS, Appellant,

vs.

SAMUEL RUBENSTEIN et al.

No. 5993.

FLORENCE E. MYERS, Appellant,

vs.

SAMUEL RUBENSTEIN et al.

and No. 5994.

JOHN MYERS, Appellant,

vs.

SAMUEL RUBENSTEIN et al.

a Supreme Court of the District of Columbia.

At Law.

No. 73338.

ROBERT K. WILLIAMS, Plaintiff,

vs.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

At Law.

No. 73339.

FLORENCE E. MYERS, Plaintiff,

vs.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

At Law.

No. 73340.

JOHN MYERS, Plaintiff,

VS.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled causes, to wit:

1 *Declaration.*

Filed Jun. 1, 1927.

In the Supreme Court of the District of Columbia.

Law. No. 73338.

ROBERT K. WILLIAMS, Plaintiff,

VS.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

The plaintiff Robert K. Williams, sues the defendants, Samuel Rubenstein and Pauline Rubenstein for that heretofore, to-wit, on the sixth day of November, 1926, between the hours of Three and Four o'clock in the afternoon, the plaintiff, who is a contractor and builder and who was engaged in building and constructing the bridge hereinafter mentioned, was lawfully standing on a work platform adjacent to and joining the bridge under construction known or commonly called the Hunting Creek Bridge, near Alexandria City, in the State of Virginia, in the exercise of all due care and caution; that the defendant Samuel Rubenstein was the owner of an automobile, the use of which said automobile said defendant provided for members of his family; that the defendant Pauline Rubenstein was the wife of said defendant Samuel Rubenstein and a member of his family; that prior to the happening of the grievances hereinafter set out, said defendant Pauline Rubenstein, from time to time, drove and operated said

automobile for her pleasure and purposes and on the date aforesaid, defendant Pauline Rubenstein was driving and operating said automobile under and by virtue of the relationship and conditions existing in the family of the defendant Samuel Rubenstein in reference to the use and

2 operation of the said automobile, on and over the aforesaid Hunting Creek Bridge; that it then and there became and was and continued to be the duty of said defendant Pauline Rubenstein so to operate and drive said automobile as not to injure persons or property lawfully on and along said Bridge or lawfully on a certain work platform adjacent to and joining said Bridge, but the plaintiff avers that unmindful of her duty in the premises, and in disregard of the rights of plaintiff, said defendant, at the place aforesaid, on the date aforesaid, so negligently, carelessly, and recklessly operated and drove said automobile that by reason of her negligence, carelessness, and recklessness, and in consequence thereof, said automobile did leave the vehicular drive-way of said Bridge and did collide with and strike plaintiff, who was lawfully standing on said work platform adjacent to and adjoining said Bridge as aforesaid, and in consequence thereof plaintiff was forcibly and violently knocked down and thrown to the floor of said work platform; that by reason whereof plaintiff was severely and greatly injured and hurt and was bruised, contused, abraded, lacerated, and strained over his entire body; the ligaments and tendons of his legs were sprained, strained and pulled apart; muscle fibres in calf of both legs were separated causing his legs and ankles to swell; the cartilaginous tissues were torn from his breast bone; an incised wound over his entire right cheek which left a scar on said right cheek which is a permanent disfigurement; and received and suffered injury to the left ulnar nerve causing numbness in the entire left arm, loss of use of arm and swelling in left arm and wrist; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to his nerves and to his entire nervous system and

3 great mental and physical pains and sufferings, and plaintiff has been put to great expense in procuring medicines and medical and surgical services, supplies, and treatments in endeavoring to be cured of his said injuries;

Whereby, and in consequence of which, the plaintiff became and was rendered sick, sore, lame, and disordered, and confined to his bed and house for a long space of time, and incapacitated from attending to his duties as contractor and builder and from earning a livelihood at his said profession, and will continue to be sick, sore, lame, and disordered and incapacitated from fully attending to his profession aforesaid and from earning his livelihood as a contractor and builder and from earning as much as he otherwise would have earned and will permanently suffer from said contusions, abrasions, lacerations, and strains over his entire body; sprained, strained and pulled apart ligaments and tendons of his legs; separated muscle fibres in calf of both legs, causing his legs and ankles to swell; cartilaginous tissues torn from his breast bone; incised wound over his entire right cheek which left a permanent disfigurement on said cheek; injury to the left ulnar nerve causing numbness in the entire left arm, loss of use of arm and swelling in the left arm and wrist; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to his nerves and to his entire nervous system; wherefore, plaintiff brings this suit and claims the sum of Fifteen thousand (\$15,000.00) dollars, besides the costs of suit.

ALBERT D. ESHER,
Attorney for Plaintiff.

4

Amendment to Declaration.

(With leave of Court first had and obtained.)

Filed Dec. 3, 1929.

* * * * *

Whereby, and in consequence of which, the plaintiff became and was rendered sick, sore, lame, and disordered, and confined to his bed and house for a long space of time, and incapacitated from attending to his duties as contractor and builder and from earning a livelihood at his said profession; that plaintiff had to expend large sums of money to employ an experienced person to manage and superintend the construction work on said bridge during his enforced absence due to said injuries and that as a further

and additional result of said injuries, plaintiff lost large sums of money on the cost of construction of said bridge due to the fact that the progress and completion of said work was delayed and that considerable portions of said work had to be replaced, none of which cost or expense would have been suffered or incurred by plaintiff but for the injuries aforesaid; and plaintiff will continue to be sick, sore, lame, and disordered and incapacitated from fully attending to his profession aforesaid and from earning his livelihood as a contractor and builder and from earning as much as he otherwise would have earned and will permanently suffer from said contusions, abrasions, lacerations, and strains over his entire body; sprained, strained and pulled apart ligaments and tendons of his legs; separated muscle fibres in calf of both legs, causing his legs and ankles to swell; cartilaginous tissues torn from his breast bone; incised wound over his entire right cheek which left a permanent disfigurement on said cheek; injury to the left ulnar nerve causing numbness in the
5 entire left arm, loss of use of arm and swelling in the left arm and wrist; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to his nerves and to his entire nervous system; wherefore, plaintiff brings this suit and claims *and* the sum of Fifteen thousand (\$15,000.00) dollars, besides the costs of suit.

ALBERT D. ESHER,
Attorney for Plaintiff.

Pleas.

Filed Jul. 27, 1927.

* * * * *

Now comes the defendants, Samuel Rubenstein and Pauline Rubenstein, by their attorneys, Harry F. Kennedy and Frederick K. Duvall and for pleas to the declaration filed in the above entitled cause say:

1. That defendants have no knowledge or information thereof sufficient to form a belief as to whether the plaintiff was, on the 6th day of November, 1926, a contractor and builder and engaged in building and constructing a bridge over Hunting Creek, near Alexandria, in the State of Virginia.

2. Defendants admit that Pauline Rubenstein is the wife of the co-defendant, Samuel Rubenstein, but deny severally and separately each and every other allegation in said declaration contained.

3. Defendants deny that plaintiff was injured, hurt, bruised, contused, abraded, lacerated and strained over his entire body, or that in fact injured at all.

4. Defendants deny that plaintiff has been put to
6 great expense in procuring medicine and medical and surgical services, supplies and treatments, in endeavoring to be cured of his said alleged injuries.

5. Defendants deny that plaintiff became and was rendered sick, sore, lame and disordered and confined to his bed and house for a long space of time, or incapacitated from attending to his alleged duties as contractor and builder or that he will continue to be disordered and incapacitated from fully attending to said alleged profession or from earning a livelihood as such, or that he is in any manner suffering permanent injuries by reason of said alleged injuries.

6. For a further plea to plaintiff's said declaration, defendants say that the supposed injuries mentioned by plaintiff in his said declaration were caused by, and wholly the result of plaintiff's negligence and carelessness in removing or causing the removal of the guard rail maintained between the by path or road way and the work platform, upon which plaintiff was standing at the time of said alleged injuries.

7. For a further plea, defendants say that the injuries mentioned by plaintiff in said declaration were caused by, and wholly the result of the negligent and careless operation of a truck being operated and maintained by the plaintiff, through and by his agent, servant or employee on said drive way or by pass, in that plaintiff, through and by his agent, servant or employee failed to keep said truck under proper control and failed to bring it to a stop when he saw, or could have seen the danger of a collision in time to prevent it, and did collide with the automobile of the defendants.

8. Defendants further say that the supposed injuries mentioned by plaintiff in his said declaration were
7 caused by and wholly the result of plaintiff's own negligence in that plaintiff caused said road way to

be obstructed by a pile of gravel, and failed to properly guard or protect north bound traffic on said bridge or by pass, while the trucks of plaintiff were using the said bridge or by pass.

HARRY F. KENNEDY,
FREDERICK G. DUVALL,
Attorneys for Defendants.

Pleas to Amendment to Declaration.

Filed Jan. 14, 1930.

* * * * *

Comes now the defendants, Samuel Rubenstein and Pauline Rubenstein by their attorneys, Harry F. Kennedy and Frederick G. Duvall, and for pleas to the Amendment to the Declaration say:

1. Defendants deny that plaintiff had to expend large sums or any sums of money to employ an experienced person to manage and superintend the construction work on said bridge during any absence due to the alleged injuries complained of, but if any competent manager or superintendent was employed by plaintiff, it was wholly because plaintiff was incompetent to fulfill his said contract to build said bridge which contract was executed on, to-wit, the 17th day of June, 1926, and provided among other things, that said bridge would be completed by November 1, 1926.

2. And for a further plea to said amendment to the declaration, defendants admit that said bridge was
8 not completed within the time specified by plaintiff's contract and in fact not completed until to-wit, May, 1927; that formal complaints were lodged with to-wit, a Chief Engineer of the State Highway Commission, complaining of the slow progress being made by plaintiff, as early as to-wit, July 20, 1926, through and to-wit, September 8, 1926, and that said State Highway Department threatened to take said contract away from plaintiff unless he made better progress in the construction of said bridge; and defendants deny that because of the alleged injuries complained of, that considerable portions of the work on said bridge had to be replaced.

3. And for a further plea to said amendment, defendants admit that the progress and completion of said work or

contract was delayed, but deny that said delay or completion was the result of the alleged injuries complained of by the plaintiff herein, and said defendants deny each and every other allegation in said amendment to said declaration alleged.

HARRY F. KENNEDY,
FREDERICK G. DUVALL,
Attorneys for Defendants.

Memorandum.

February 9, 1933.—Verdict for defendant by direction of Court.

9 Supreme Court of the District of Columbia.

Thursday, February 16, 1933.

Session resumed pursuant to adjournment, Hon James M. Proctor, Justice, presiding.

* * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause, it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

Tuesday, February 28, 1933.

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Justice, presiding.

* * * * *

Comes now the plaintiff by his attorney of record and notes an appeal to the Court of Appeals of this District from the judgment entered herein on the 16th day of February, 1933; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

March 11, 1933.—Undertaking on appeal approved and filed.

10

Declaration.

Filed Jun. 1, 1927.

In the Supreme Court of the District of Columbia.

Law. No. 73339.

FLORENCE E. MYERS, Plaintiff,

vs.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

The plaintiff, Florence E. Myers, sues the defendants Samuel Rubenstein and Pauline Rubenstein for that heretofore, to-wit, on the Sixth day of November, 1926, between the hours of Three and Four o'clock in the afternoon, the plaintiff was lawfully standing on a work platform adjacent to and adjoining the bridge under construction known or commonly called the "Hunting Creek Bridge" near Alexandria City in the State of Virginia, in the exercise of all due care and caution; that the defendant Samuel Rubenstein was the owner of an automobile, the use of which said automobile said defendant provided for the members of his family; that the defendant Pauline Rubenstein was the wife of said defendant Samuel Rubenstein and a member of his family; that prior to the happening of the grievances hereinafter set out, said defendant Pauline Rubenstein, from time to time drove and operated said automobile for her pleasure and purposes and on the date aforesaid, defendant Pauline Rubenstein was driving and operating said automobile under and by virtue of the relationship and conditions existing in the family of the defendant Samuel Rubenstein in reference to the use and operation of said automobile, on and over the aforesaid Hunting Creek Bridge; that it then and there became and was and continued to be the duty of

said defendant Pauline Rubenstein so to operate
11 and drive said automobile as not to injure persons
or property lawfully on a certain work platform
adjacent to and adjoining said Bridge, but the plaintiff
averts that unmindful of her duty in the premises, and in
utter disregard of the rights of plaintiff, said defendant,
at the place aforesaid, on the date aforesaid, so neglig-
ently, carelessly, and recklessly operated and drove said
automobile that by reason of her negligence, carelessness
and recklessness, and in consequence thereof, said auto-
mobile did leave the vehicular drive way of said bridge
and did collide with and strike plaintiff, who was law-
fully standing on said work platform, adjacent to and ad-
joining said bridge as aforesaid, and in consequence thereof
plaintiff was forcibly and violently knocked down and
thrown to the floor of said work platform; that by reason
whereof plaintiff was severely and greatly injured and
hurt and was bruised, contused, abraded, lacerated and
strained over the entire body; incised, lacerated contused
wounds over the entire left leg extending from top of the
foot up to the thigh, accompanied with hemorrhages under
the skin; incised wound of the head; left arm and abdo-
men; loss of weight, loss of appetite, impaired eyesight,
headaches, sleeplessness, attacks of vertigo, pain and suf-
fering during locomotion, shock to her nerves and to her
entire nervous system, and great mental and physical pains
and sufferings, and plaintiff has been put to great expense
in procuring medicines and medical and surgical services,
supplies and treatments in endeavoring to be cured of her
said injuries; *whereby*, and in consequence of which the
plaintiff became and was rendered sick, sore, lame, and
disordered, and confined to her bed and home for a long
space of time, and incapacitated from attending to
12 her work and duties and from earning a livelihood
and will continue to be sick and sore, lame, disor-
dered and incapacitated from fully attending to her work
and duties aforesaid and from earning her livelihood and
from earning as much as she otherwise would have earned
and will permanently suffer from said contusions, abra-
sions, and strains over her entire body, incised, lacerated
contused wounds over the entire left leg extending from
top of the foot up to the thigh, accompanied with hemor-

rhages under the skin; incised wound of the head; left arm and abdomen; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to her nerves and to her entire nervous system; *whereof* plaintiff brings this suit and claims the sum of \$5,000.00, besides the costs of suit.

ALBERT D. ESHER,
Attorney for Plaintiff.

Pleas.

Filed Jul. 27, 1927.

* * * * *

Now comes the defendants, Samuel Rubenstein and Pauline Rubenstein, by their attorneys, Harry F. Kennedy and Frederick G. Duvall, and for pleas to the declaration filed in the above entitled cause say:

1. Defendants admit that Pauline Rubenstein is the wife of the co-defendant, Samuel Rubenstein, but deny severally and separately each and every other allegation in said declaration contained.

2. Defendants deny that plaintiff was injured, hurt, bruised, contused, abraded, lacerated and strained
13 over her entire body, or that in fact injured at all.

3. Defendants deny that plaintiff has been put to great expense in procuring medicine and medical and surgical services, supplies and treatments, in endeavoring to be cured of his said alleged injuries.

4. Defendants deny that plaintiff became and was rendered sick, sore, lame and disordered and confined to her bed and house for a long space of time, or incapacitated from attending to her alleged duties and from earning her livelihood or that she is in any manner suffering permanent injury by reason of said alleged injuries.

5. For a further plea to the declaration herein, defendants deny that plaintiff was lawfully standing on a work platform, or as alleged, in that she was not employed by Robert K. Williams, the contractor, and had no right on said platform.

6. For further plea to said declaration, defendants allege that the supposed injuries mentioned by plaintiff

in her declaration, were wholly the result of her own negligence and carelessness in being upon the road way or bridge and standing upon said work platform, which was not a lawful highway.

7. For a further plea to said declaration, defendants say that the supposed injuries complained of by plaintiff were the result of the carelessness and negligence of one Robert K. Williams, a contractor engaged in constructing said bridge, in that the said Robert K. Williams did, through and by his agents, servants and employees cause the road way to be obstructed by a pile of gravel, failed to guard north bound traffic while the trucks of said Williams were south bound on said bridge, and did cause
 14 said truck or trucks to be operated in a careless and negligent manner so that same would collide with the automobile of defendants, and did remove or cause to be removed a guard rail around said work platform, which removal of said guard rail permitted the automobile of defendants, after being struck by the truck of said Williams, to enter upon said work platform.

HARRY F. KENNEDY,
 FREDERICK G. DUVALL,
Attorneys for Defendants.

Memorandum.

February 9, 1933.—Verdict for defendant by direction of Court.

Supreme Court of the District of Columbia.

Thursday, February 16, 1933.

Session resumed pursuant to adjournment, Hon. James M. Proctor, Justice, presiding.

* * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause, it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

15

Tuesday, February 28, 1933.

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Justice, presiding.

* * * * *

Comes now the plaintiff by her attorney of record and notes an appeal to the Court of Appeals of this District from the judgment entered herein on the 16th day of February, 1933; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

March 11, 1933.—Undertaking on appeal approved and filed.

Declaration.

16

Filed Jun. 1, 1927.

In the Supreme Court of the District of Columbia.

Law. No. 73340.

JOHN MYERS, Plaintiff,

VS.

SAMUEL RUBENSTEIN and PAULINE RUBENSTEIN, Defendants.

The plaintiff, John Myers, sues the defendants Samuel Rubenstein and Pauline Rubenstein for that heretofore, to-wit, on the Sixth day of November, 1926, between the hours of Three and Four o'clock in the afternoon, the plaintiff, was lawfully standing on a work platform adjacent to and adjoining the bridge under construction known or commonly called the "Hunting Creek Bridge" near Alexandria City in the State of Virginia, in the exercise of all due care and caution; that the defendant Samuel Rubenstein was the owner of an automobile, the use of which said automobile said defendant provided for the members of his family; that the defendant Pauline Rubenstein was the wife of said defendant Samuel Rubenstein and a member of his family; that prior to the happening of the grievances hereinafter set out, said defendant Pauline Rubenstein, from time to

time drove and operated said automobile for her pleasure and purposes and on the date aforesaid, defendant Pauline Rubenstein was driving and operating said automobile under and by virtue of the relationship and conditions existing in the family of the defendant Samuel Rubenstein in reference to the use and operation of said automobile, on and over the aforesaid Hunting Creek Bridge; that it then and there

became and was and continued to be the duty of said
17 defendant Pauline Rubenstein so to operate and drive said automobile as not to injure persons or property lawfully on and along said Bridge or lawfully on a certain work platform adjacent to and adjoining said Bridge, but the plaintiff avers that unmindful of her duty in the premises, and in utter disregard of the rights of plaintiff, said defendant, at the place aforesaid, on the date aforesaid, so negligently, carelessly, and recklessly operated and drove said automobile that by reason of her negligence, carelessness and recklessness, and in consequence thereof, said automobile did leave the vehicular drive way of said bridge and did collide with and strike plaintiff, who was lawfully standing on said work platform, adjacent to and adjoining said bridge as aforesaid, and in consequence thereof plaintiff was forcibly and violently knocked down and thrown to the floor of said work platform; that by reason whereof plaintiff was severely and greatly injured and hurt and was bruised, contused, abraded, lacerated and strained over the entire body; sprained right arm at joint and forearm; incised wound over the lower third of right tibia, causing ulcers; loss of use of his right arm; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to his nerves and to his entire nervous system, and great mental and physical pain and sufferings, and plaintiff has been put to great expense in procuring medicines and medical and surgical services, supplies and treatments in endeavoring to be cured of his said injuries; *whereby*, and in consequence of which the plaintiff became and was rendered sick, sore, lame, and disordered, and confined to his bed and home for a long space of time, and incapacitated from attending to his work and duties and from
18 earning a livelihood and will continue to be sick, sore, lame, and disordered and incapacitated from fully attending to his work and duties aforesaid and from

earning his livelihood and from earning as much as he otherwise would have earned and will permanently suffer from said contusions, abrasions, lacerations, and strains over his entire body, sprained right arm at joint and forearm, incised wound over the lower third of right tibia, causing ulcers; loss of use of his right arm; loss of weight, loss of appetite, impaired eyesight, headaches, sleeplessness, attacks of vertigo, pain and suffering during locomotion, shock to his nerves and to his entire nervous system; *whereof* plaintiff brings this suit and claims the sum of \$5,000.00, besides the costs of suit.

ALBERT D. ESHER,
Attorney for Plaintiff.

Pleas.

Filed Jul. 27, 1927.

* * * * *

Now comes the defendants, Samuel Rubenstein and Pauline Rubenstein, by their attorneys, Harry F. Kennedy and Frederick G. Duvall and for pleas to the declaration filed in the above entitled cause say:

1. Defendants admit that Pauline Rubenstein is the wife of the co-defendant, Samuel Rubenstein, but deny severally and separately each and every other allegation in said declaration contained.

2. Defendants deny that plaintiff was injured, hurt, bruised, contused, abraded, lacerated and strained over his entire body, or that in fact injured at all.

3. Defendants deny that plaintiff has been put to great expense in procuring medicine and medical and surgical services, supplies and treatments, in endeavoring to be cured of his said alleged injuries.

4. Defendants deny that plaintiff became and was rendered sick, sore, lame and disordered and confined to his bed and house for a long space of time, or incapacitated from attending to his alleged duties and from earning a livelihood, or that he is in any manner suffering permanent injury by reason of said alleged injuries.

5. For a further plea to said declaration, defendants say that the supposed injuries mentioned by plaintiff were caused by the negligence and carelessness of his fellow servants or employees, in that one of the agents of Robert K. Williams, the contractor constructing said bridge, and

by whom plaintiff was also employed, did so carelessly and negligently operate a truck operated and maintained by said Williams, and failed to keep same under proper control when he saw or could have seen the danger of a collision in time to prevent it, and caused said truck to collide with the automobile of the defendants, and caused said defendants' automobile to be forced in and upon the said work platform where plaintiff was standing.

6. For a further plea defendants say that the supposed injuries mentioned by plaintiff in his said declaration were caused by the carelessness and negligence of one Robert K. Williams, a contractor, who was engaged in building or repairing said concrete bridge, and who caused to be built said work platform, and said by path or temporary road way over which the automobile of defendants was being operated and did cause said by pass or temporary road way to be obstructed by a pile of gravel, without leaving
20 sufficient space for north bound traffic, and did
cause to be operated thereon in a southerly direction
a truck which said Williams was using in said construction work, and said truck was so carelessly and negligently operated in that it failed to stop in order to avoid a collision and did collide with the automobile of the defendants and did force said automobile of defendants in and upon said work platform, by reason of the fact that the guard rail or railing had been removed by said contractor from along said work platform.

HARRY F. KENNEDY,
FREDERICK G. DUVALL,
Attorneys for Defendants.

Memorandum.

February 9, 1933.—Verdict for defendant by direction of Court.

Supreme Court of the District of Columbia.

Thursday, February 16, 1933.

Session resumed pursuant to adjournment, Hon James M. Proctor, Justice, presiding.

* * * * *

It appearing under rule of Court that judgment should now be entered on the verdict in this cause, it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

21

Tuesday, February 28, 1933.

Session resumed pursuant to adjournment, Hon. Joseph W. Cox, Justice, presiding.

* * * * *

Comes now the plaintiff by his attorney of record and notes an appeal to the Court of Appeals of this District from the judgment entered herein on the 16th day of February, 1933; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

March 11, 1933.—Undertaking on appeal approved and filed.

22

Assignment of Errors.

Filed February 27, 1933.

* * * * *

Come now the plaintiffs in the above-entitled cases, by their Attorneys, and having duly noted an appeal to the Court of Appeals from the Judgments herein, as their Assignment of Errors committed by the Trial Court, says that the Court erred in the following particulars:

1. In sustaining defendant's Motion for a directed verdict at the conclusion of the plaintiffs' cases.

2. In holding that the evidence in these cases was not sufficient to establish the relationship of principal and agent or Master and Servant, under the laws of the State of Virginia.

3. In holding that the "Family Purpose" doctrine is not recognized in the State of Virginia.

4. In refusing to hold that the "Family Purpose" doctrine, as recognized by the State of Virginia, applied to these cases.

5. In refusing in evidence the Pleas of defendant, filed in the Supreme Court, and the Brief filed by defendant in the Court of Appeals of the District of Columbia, on March 6th, 1931.

THOMAS A. WILLIAMS,
ALBERT D. ESHER,
Attorneys for Plaintiffs.

Service of copy of above acknowledged this 27 day of February, 1933, without waiving my right to object or move to strike.

HENRY I. QUINN,
Attorney for Defendant.

23

Memorandum.

March 10, 1933.—Proposed Bill of Exceptions filed.

Supreme Court of the District of Columbia.

Monday, April 10, 1933.

Session resumed pursuant to adjournment, Hon. James M. Proctor, Justice, presiding.

* * * * *

Come now the parties hereto, in each of the above-entitled causes, by their respective attorneys of record; and, thereupon, the plaintiff in each of the said causes, submits to the Court his/her Bill of Exceptions taken at the trial of this cause and prays that the same be signed and made of record, nunc pro tunc, which is hereby accordingly done.

Designation of Record.

Filed February 27, 1933.

* * * * *

The Clerk of the Court will please prepare a Record in the above-entitled cases for the Court of Appeals and include therein the following:

1. Original Declarations.
2. Amendment to Declaration.
3. Pleas.

4. Verdict and Judgments for defendant.
5. Appeal from Judgments and Order fixing undertakings for costs on appeal.
6. Assignment of Errors.
7. Memo. of filing undertakings for costs.
- 24 8. This Designation of Record.

THOMAS A. WILLIAMS,
ALBERT D. ESHER,

Attorneys for Plaintiffs.

Service of copy of above Order and Designation of Record acknowledged this 27th day of February, 1933, without waiving any rights to object to and move to strike.

HENRY I. QUINN,
Attorney for Defendant.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 73338 at Law, wherein Robert K. Williams is Plaintiff and Samuel Rubenstein and Pauline Rubenstein are Defendants; in cause No. 73339 at Law, wherein Florence E. Myers is Plaintiff and Samuel Rubenstein and Pauline Rubenstein are Defendants and in cause No. 73340 at Law, wherein John Myers is Plaintiff and Samuel Rubenstein and Pauline Rubenstein are Defendants, as the same remain upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of June, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Filed Mar. 10, 1933.

N. 87, P. 144.

In the Supreme Court of the District of Columbia.

No. 73338, No. 73339, No. 73340.

ROBERT K. WILLIAMS, Plaintiff,

VS.

SAMUEL RUBENSTEIN, Defendant.

FLORENCE E. MYERS, Plaintiff,

VS.

SAMUEL RUBENSTEIN, Defendant.

JOHN MYERS, Plaintiff,

VS.

SAMUEL RUBENSTEIN, Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled causes, having been consolidated for trial, came on for trial before Mr. Justice Proctor and a Jury on the 6th day of February, 1933, and were concluded on the 9th day of February, 1933, the plaintiffs being represented by Messrs Thomas A. Williams and Albert D. Esher and the defendant by Mr. Henry I. Quinn.

The following proceedings were had:

The plaintiffs to maintain the issues on their part joined, called one **Pauline Rubenstein**, who testified substantially as follows:

That she is the wife of the defendant Samuel Rubenstein and was driving the car on the 6th day of November 1926, at the time of the accident; that she was on her way back from Camp Humphries and her son, David Rubenstein and a friend, Mrs. Witkowski and her daughter were in the car with them; that when she testified in this case in March 1930 her husband the defendant here was present in court; witness denied that on the former trial of this case, in March, 1930 she had testified that the

automobile in question was owned by her husband; that she was driving said automobile with his permission and consent; that she was accustomed to driving this automobile with the permission and consent of her husband about Washington and the surrounding territory and that the automobile in question was purchased and owned and used by her and her husband as the family car. On the contrary, witness testified (at this trial) that the automobile was not owned by her husband but belonged to the plant and when asked if she had driven the car from time to time, witness replied: "Whenever the plant could spare it"; that after Counsel for the plaintiffs announced to the Court that they had been taken by surprise by the witness, the following occurred:

"The Court: Of course, Mr. Williams, if you should show she testified differently, that is not affirmative proof of anything."

"Mr. Williams: But the record is a verity. The record certified by Mr. Justice Bailey."

"Mr. Quinn: It is no record of this Court."

The Court: "No, it is merely the résumé of the testimony."

Mr. Williams: "It is a Bill of Exceptions."

The Court: "No."

Mr. Quinn: "He makes up a Bill of Exceptions and it is referred to the Court of Appeals."

The Court: "What is the situation concerning that kind of a Bill?"

Mr. Quinn: "This witness testified that her husband owned the car and that she was driving it that day with his permission and that she had been to Ft. Humphrey's and was on the way back when the accident happened, and that is all."

The Court: "I will allow you to cross examine her."

That then and thereupon the following occurred:

"Q. Don't you remember testifying that your husband was the owner of the automobile at the time you were driving it at that time? A. I could not do so."

28 "Q. At the time of the accident? A. I could not do so because they never owned the car, the car belonged to the plant."

Witness again denied that her husband was the owner of the car at the time of the accident and stated she could not possibly make the statement that her husband was the owner of the car at the time of the accident; the car was purchased in 1926, the year of the accident. That then and thereupon the following occurred:

“Q. Mrs. Rubenstein, do you remember testifying before and saying anything at all about the fact that the car was purchased by the plant or firm, as you call it? A. I cannot remember that.”

“Q. Don't you know, as a matter of fact, that question was not brought up, that you did not make any statement about the firm? A. I don't remember.”

To which question objection of defendant was sustained and plaintiffs allowed an exception.

Witness drove the car around Washington when she was in the city but seldom outside of Washington.

Cross-examination:

Witness always asked permission of the firm and then her husband before she drove the car.

29 And thereupon, to further maintain the issues on their part joined the plaintiffs called as a witness one **C. B. Kinnier**, who testified substantially as follows:

That in 1926 he was resident engineer for the Virginia State Highway Department, and was in charge, representing the state, of the construction of the Hunting Creek Bridge and was present on said bridge at the time this accident occurred; witness, Mr. Williams, and the inspector on the bridge, were standing on the work platform, conversing together, Mr. Williams had turned to say something to the hoisting engineer and just at that time witness saw the automobile turn in toward them; witness shouted to them to jump; witness jumped back as did Mr. Ramsey, the inspector; this automobile struck Mr. Williams and also Mr. and Mrs. Myers, who were likewise standing on the work platform; the automobile ran over Mrs. Myers and it had to be lifted from her; Mr. Myers was knocked down, witness was looking for Mr. Williams who had been knocked out of his sight; there was a guard rail around the

edge of the bridge; when the automobile came through there, it took part of the guard rail with it and ran into a coal pile, just north of the hoisting engine, and stopped; the three injured persons where placed in cars and taken to the Alexandria hospital; there was no material of any kind on the by-pass; it was the duty of witness and also the duty of the inspector to see that this by-pass, or driveway was kept free of material; Mr. Williams was off the job for some time after the accident and when he returned to the job he limped and could not move around as he had before the accident; Mr. Williams had to employ a man to take his place after the accident; the temporary driveway was constructed according to the sketch and drawing and specifications and was approved and accepted by the state.

Cross-examination:

30 The automobile came north and there was a guard rail along the by-pass or driveway; the work platform was possibly a few inches higher or lower than the bridge; the automobile was about thirty feet from witness when he first noticed it and witness had to jump back several feet to get out of the way of the car; witness saw the car before it hit the rail; when the car hit the rail it tore down probably forty or thirty feet of the rail; the automobile was going closer to fifteen miles an hour than ten miles an hour; witness measured the by-pass or roadway and it was eighteen feet wide at every point; witness did not see a truck go down the road shortly before the accident nor see anything that might have caused the automobile to change its direction.

And thereupon, to further maintain the issues on their part joined, the plaintiffs called as a witness one of the plaintiffs, **Robert K. Williams**, who testified substantially as follows:

That he resides in Richmond, Virginia, and at the time of the accident complained of was a general contractor and bridge builder; that he was constructing the Hunting Creek Bridge, just south of Alexandria, Virginia, under contract with the Virginia State Highway Department; that the accident happened on November 6th, 1926, Saturday, between the hours of three and four o'clock in the afternoon; witness, Mr. Kinnier and Mr. Ramsey were standing in a

triangular shape on the work platform discussing the work; witness turned around to give some instructions to his hoisting engineer when he heard someone shout "lookout" and witness looked up just in time to see a large car bearing down upon him; he was directly in the center line of the path of this car; the feeling that witness had at that time was just as though you were standing on a railroad track and a big engine was coming right toward you and he only had time to throw up his arm and the car struck him and knocked him down; in attempting to arise the car then caught witness just across the hips and pushed him forward into a pile of cinders; that is all that witness can remember; the driveway and the work platform was the same elevation the driveway was eighteen feet wide, a

31 two way traffic lane; there were specifications and a sketched drawing drawn up as to how the driveway should be constructed; this driveway was accepted and paid for by the state; this driveway had a wheel guard down at the bottom of the floor of the driveway, a six by six wheel guard, that attached to that wheel guard was a rail possibly three feet high the guard rail was a timber six inches by six inches, around the length of this driveway, exactly like a concrete curb in the city on the street, if the wheel of an automobile hit it, not going very fast, it would deflect it enough so the parties would stay within their area; this guard rail was bolted down; witness had one small Ford work truck that was used to carry forms from the lumber yard onto the bridge; the lumber yard was two hundred and fifty or three hundred yards from the bridge toward Alexandria, and the truck was at the lumber yard at the time of the accident; witness was getting ready to knock off for the day; as a result of the accident witness was bruised all over from his heels to the top of his head; also a cut on his cheek; a cartilage was torn loose from the breastbone, a very serious injury that has never left witness; witness had trouble with his left arm for a number of years; his entire body, legs, and muscles were torn; ankles were bruised and swollen to about twice their normal size and witness had an injury to his back up near the shoulder and it has bothered him ever since and makes it difficult to move his head freely and when he turns his head at all it is painful; witness's back pains him two or three inches below the base of his neck; the left leg still

bothers witness and at times he has no control, over his left foot; not all the time, but at times; Dr. Warfield, of Alexandria, Virginia, treated witness immediately after the accident, throughout the afternoon and night and the next day he was taken to Richmond, Virginia, and treated by Dr. Grove-Hagan for a period of about ten days; witness then came back to Alexandria and would go down on the bridge job as often as he could but he was not able to get around sufficiently to be of much good; injuries to his legs and ankles were so painful and swollen; Dr. Warfield

32 would treat witness when he was in Alexandria these treatments lasted for a period of two or three months, but not every day; Dr. Grove-Hagan also treated witness; also Dr. Gallant of Richmond, Virginia; also treated witness; a Mr. White was employed as superintendent on the job at \$250.00 per month, straight time, from the time of the injury until the latter part of February and from then until April a Mr. Stevens was employed as superintendent at \$50.00 per week; since sustaining the injuries plaintiff has not been able to carry on his business of bridge building or of general contractor; in bridge building it takes one sure of foot, nimble and active and the injuries sustained prevented the plaintiff continuing in this business and he had to give it up; headaches and sleeplessness and loss of weight followed the accident; any exercise of any duration causes plaintiff's ankles to swell over the sides of his shoes and to pain him; that he suffered from his nerves, he did not know what nerves were before the accident; he was not able to use his arm, a numbness in his arm, for two or three years; there was no material of any kind, or hose, iron or rubber on the driveway at the time of the accident; it was the duty of Mr. Ramsey the inspector; Mr. Kinnier, the resident engineer, and plaintiff to see to it that the driveway was kept clean; this driveway was built to take care of traffic temporarily while the bridge was being constructed.

Cross-examination:

Witness knows that Mr. Snoots is a police officer in Alexandria, Virginia; he does not know Mr. Snoots; he went to police headquarters and stated he did not want Mrs. Rubenstein fined; he did not say it was an unavoidable

accident; about a week or ten days after the accident the plaintiff went to the job; he would go to the job and then go back to Alexandria and lie down; plaintiff stayed on the job an hour or two the first day he returned to the bridge; while in Alexandria he would go down every day; he was in Alexandria two or three days and would then go

33 back to Richmond, Virginia, for a few days or a week; after the accident he was in Richmond most of the time he could not give the job the proper attention and had to give some one his place; plaintiff was awarded another contract by the State Highway Commission of the State of Virginia for eighty some thousand dollars in February or March, but he was not on this job as much as three days at a time; the work on the Hunting Creek Bridge job was supposed to have been finished December 1st; before the accident, Mr. White, was employed at a carpenter's wage of 60¢ per hour, to keep him employed; he had twenty-five years' experience at bridge construction and he had before worked for plaintiff as superintendent; after the accident; Mr. White was placed in charge of the job as superintendent; after February Mr. White was also employed as superintendent on the other contract job awarded plaintiff at Smithfield, Virginia; and Mr. Stephens an engineer, was employed to finish the Hunting Creek Bridge job; the by-pass intersected the old bridge and this by-pass or driveway was a uniform curve; plaintiff sketched the bridge job or by-pass or driveway on the blackboard and explained to the court and jury; plaintiff did not see any material or so forth on the by-pass or driveway the day of the accident and did not notice any traffic on the driveway the time of the accident; the Yard was located two hundred and fifty yards from the bridge toward Alexandria; the truck was at the Yard at the time of the accident there was a section of the hand rail of about four feet cut out to allow workmen onto the work platform, which opening was a little south of where plaintiff was standing on the work platform at the time of accident; he did not see the Rubenstein automobile until it was upon him; six or eight feet away; the wheel guard or guard rail was on both sides of the by-pass or driveway, like a curb on a street and six inches high; plaintiff was knocked unconscious and was taken to Alexandria for treatment; he regained consciousness on the way to Alexandria; Dr. War-

field, treated him that afternoon and night and the next day he was taken to Richmond in his own automobile, which was driven by Everett Kelly; plaintiff 34 was confined to his bed — Richmond for a whole week; plaintiff drove his car back to Alexandria and would drive to the job; a section of the guard rail and hand rail would be taken away to permit truck to deposit lumber or material on the work platform; the truck would back completely off the by-pass or driveway onto the old bridge which was the work platform; no portion of this rail was down at the time of the accident.

The plaintiffs, to further maintain the issue on their part joined, called as a witness one **Dr. J. A. Gallant**, who testified substantially as follows:

That he is a practicing physician of Richmond, Virginia and examined Robert K. Williams about three months ago and subsequently two or three times; Mr. Williams complained of a sore spot on the right side of his chest near the mid-line; of swelling of both ankles on the least exertion; a neurotic of the knee for the past four or five years, a cut below the eye; the examination disclosed a scar beneath the right eye; stiff neck; a lump in the region of the ilio-cervical vertebræ; tender area in chest in the neighborhood of the second, third and fourth costal cartilages, which was definitely enlarged; a definite thickening of the chest wall and a thickened area in the region of the external malleolus; that is, the bone which is on the outside of the leg (indicating), the end of the short bone in the ankle, a thickening of the tissues, around the ankle, the conditions existing as a result of these injuries are permanent; that there is an arthritic condition in back of neck, which is also permanent.

And next the plaintiffs, to further maintain the issues on their part joined, read the deposition of **Dr. N. Grove Hagan**, who testified substantially as follows:

That he has been practicing medicine since 1910 in Richmond, Virginia; that he examined Robert K. Williams one of the plaintiffs in this case, on November 7th, 1926, at the latter's home, three one o one (3101) Lamb avenue, 35 Richmond, Virginia, and found many contusions and lacerations on his right cheek; both legs and hips

were lacerated and swollen and contused, and patient complained of much pain and soreness in the calves of his legs; swelling and feeling of oppression of the chest; the condition of the chest was rather serious and X-ray pictures were taken; that witness has examined Williams, several times since; the soreness in the chest persisted especially in the right side; it has been more or less sore all of the time and excessive exercise and exertion seem to increase the soreness; the front part of the chest was injured and perhaps a juncture of the cartilage with the bone; this soreness was present a day or two ago when I examined him; Williams complained bitterly for a long time, months and months, of that soreness in his legs: Witness had not figured up the amount of his bill to date.

And thereupon, to further maintain the issues on their part joined, the plaintiffs called as a witness one of the plaintiffs, **John Myers**, who gave testimony as follows:

That he is plaintiff in one of these cases and the husband of Florence E. Myers, also one of the plaintiffs in one of these cases; that he was employed on the Hunting Creek Bridge construction job by plaintiff Robert K. Williams, as a fireman; on Saturday, November 6th, 1926, he was standing on the work platform inside the guard rail with his wife who had come to the job to get from him marketing money; that an automobile broke through the guard rail and struck witness and his wife; the wife of witness was under the left front wheel of the automobile lying flat in a pile of coal; it was a Buick sedan and was being driven by Mrs. Pauline Rubenstein; the left leg of witness was all cut from ankle to hip; his right arm bruised and cut; lower back also injured; after the accident he was taken to the Alexandria hospital where he was treated; that as a result of his injuries, witness was out of work a little over two months; Dr. Warfield treated witness and his wife; Dr. Warfield is now dead;

36 witness could not work because his back would not permit it; Dr. Warfield charged to witness \$60.00 for treating him and \$160.00 for treating his wife; witness was earning \$25 per week; witness was out of work nearly three months; knee of witness gives way on him even now; witness could not use his right arm; that he did not see the automobile before it hit him and his wife;

that they were facing in the opposite direction; Messrs. Williams, Ramsey and Kinnier were standing near witness and his wife just before the accident; that there was no débris, hose, material or anything on the by-pass or driveway; the automobile carried the guard rail with it and that portion of the guard rail hit witness; that there was no traffic there at the time; the hoisting engine was the only thing that stopped the automobile from going into the river; the right front wheel struck the hoisting engine; that the Williams truck was up at the Yard at the time; when he first saw his wife after the accident, she was under the left front wheel of the automobile and eight or nine men were lifting it off of her.

Cross-examination:

That he could not go out to make a living and was not able to do anything; witness went to police court with his wife; before the accident the witness was putting out the fire in the boiler and had left the platform on which had rested the hoisting engine about five minutes before the accident occurred; that there was no gravel, coal or other material on the driveway or by-pass.

That then and thereupon counsel for the respective parties agreed that if Mr. Justice Jennings Bailey, who presided at the former trial of these causes was present in court as a witness for the plaintiffs, he would testify substantially that Mrs. Pauline Rubenstein, in her direct testimony when called as a witness for the plaintiffs, testified as follows:

“* * * That she was accustomed to driving this automobile with the permission and consent of her husband about Washington and the surrounding territory
37 and that the automobile in question was purchased and owned and used by her and her husband as the family car. * * *”

That then and thereupon a part or portion of an Affidavit of Mrs. Pauline Rubenstein, filed in these causes in support of the Motion for a New Trial, germane to the point in issue, was read by the Court to the Jury, as follows:

“Pauline Rubenstein, after being first duly sworn, on oath deposes and says that she is the wife of defendant named in the above causes, and was driving the car of defendant at the time of the accident of which plaintiffs complained. * * *

The plaintiffs, to further maintain the issue on their part joined, called as a witness one **Walter Duffy**, who testified substantially as follows:

That he is vice president of Stanley H. Horner, Inc., Buick automobile representatives in Washington and that he was under subpoena duces tecum to bring the record of his firm of the purchase of a Buick sedan by Samuel Rubenstein: said record shows that on August 5th, 1926, Samuel Rubenstein purchased of witness' firm a Buick seven passenger sedan, twenty-seven model; engine No. 1,717,129; the purchase price of the automobile was \$2,215.00.

Cross-examination:

Witness had no personal knowledge of the transaction; witness had reason to believe that the second hand car on which was allowed \$225 in trade was not owned by the Rubenstein Cleaning Company; that he was with Horner Company at the time; the purchase price of the new Buick was \$2,215.00 and the \$1.00 extra was for automobile tags; the application for tags is usually signed by the purchaser; there was no title law in the District of Columbia at the time.

38 That then and thereupon, to further maintain the issues on their part joined, the plaintiffs called as a witness **Albert D. Esher**, who testified substantially as follows:

That he is an Attorney-at-Law, practicing in the City of Washington, and was of Counsel in these cases which were tried before Mr. Justice Bailey in the Supreme Court of the District of Columbia, in March, 1930; that Mr. Harry F. Kennedy was then Counsel of Record and appeared as Counsel for the Defendants at said trial; that Mr. Kennedy made an admission at the Bar of this Court as to the purpose and use of the automobile in question.

That then and thereupon the following occurred:

Mr. Quinn: "We object."

The Court: "What is your purpose here?"

Mr. Williams: "My purpose is to affirmatively prove the admission at the Bar of this Court by defendant, by his Counsel, that the car was a family purpose car."

The Court: "How do you propose to prove that?"

Mr. Williams: "By Mr. Albert D. Esher, Counsel of Record and present at the previous trial."

The Court: "Testifying to what?"

Mr. Williams: "Testifying to those facts."

The Court: "I am going to sustain the objection."

To which ruling of the Court exception was duly noted.

39 The plaintiffs, to further maintain the issues, called one **Everett Kelly**, who testified substantially as follows:

That he resides at 332 North Columbia Street, Alexandria, Virginia, that he knows the plaintiff Robert K. Williams who roomed and boarded at his house during the construction of the Hunting Creek Bridge; at the time, witness was a clerk in the accounting office of the R. F. & P. Railroad Company, and worked on the side selling Tri-Co. radiator covers; as the result of a "Tip" witness went to see Mr. Samuel Rubenstein to see if he was interested in radiator covers for his home; witness first talked to the brother of the defendant who maintains a shop in the 1700 block of King Street, Alexandria, Va. that defendant Samuel Rubenstein then came up; witness asked brother of the defendant if he was the Rubenstein who had hit Mr. Williams in Alexandria and he told witness that he was not the one but that it was his brother's car; defendant Samuel Rubenstein then said it was the family car or his car; defendant said it was the family car; defendant did not purchase any radiator covers.

Cross-examination:

Witness saw defendant some time after the accident but did not remember the date; the conversation took place at the place of business on 23rd street, a cleaning and pressing place but did not know the name of the place; witness

asked the brother of the defendant: "Are you any relation to the Rubenstein that hit Mr. Williams?" and he said: "Yes, that is my brother that owned the car"; that then defendant Samuel Rubenstein came up and he said it was his car, the family car; witness simply asked who owned the car; witness has never seen the car and witness only went there to find out if they were interested in radiator covers; witness asked about the car because he knew a Rubenstein had hit Mr. Williams.

40 And thereupon, to further maintain the issues on their part joined, the plaintiffs called as a witness one of the plaintiffs, **Florence E. Myers**, who testified substantially as follows:

That she is the wife of John Myers and a plaintiff in these causes; that she came from her home the day of the accident to the bridge to get some marketing money from her husband, plaintiff John Myers, who was employed on the bridge job; witness was facing toward Alexandria and was knocked down; that she was knocked unconscious and came to in the hospital in Alexandria, Virginia; that her left leg was cut, bruised and black and blue from her hip all the way down to her foot; her left arm from her shoulder down and her shoulder cut and bruised, black and blue; she suffered injury to her neck and suffers with it right now; and suffers from injury to her back right now, and is nervous; her breast was injured and swollen to twice its size; Dr. Warfield treated her at the Alexandria hospital; that she was confined to her home for three months; Dr. Warfield, who is now dead, treated her every day for about three months; after that he treated her every other day for about three months; she could not do her house work during this six months; that she has pains in her left leg from the hip all the way down to her toes and pains in her left arm all the way down to her fingers and her back aches at time so much that she does not know what to do, especially in damp weather and these aches and pains have continued ever since the accident; her back aches right across her hips and she has a lot of headaches; before the accident, witness was well and strong and did not have any aches or pains; witness walked up the driveway on her way to meet her husband and there was nothing

on the by-pass or driveway, no coal, gravel, rubber hose, or iron pipe or hose there; witness had to stoop under the hand rail to get onto the work platform and was talking to her husband just a short time when the accident happened; that she is nervous and shaky since the accident; her leg was stiff for a long time after the accident and caused her to limp when walking, which kept up for above five months.

41 Cross-examination:

That she was unconscious when taken away from the bridge to the hospital and did not hear any conversation; she was in bed for three months and did not testify in Police Court; her husband was in Police Court but not witness.

Thereupon the plaintiffs, to maintain the issues on their part joined, called as a witness one **David Worth Penn**, who testified substantially as follows:

That he is a mechanic and worked on the Hunting Creek Bridge job; the day of the accident, he was in the tool house, which was between five hundred and seven hundred feet from the bridge, toward Alexandria; a commotion on the outside first attracted his attention and he ran out to see what was going on; he saw Mr. Lloyd bringing Mr. Williams off the temporary bridge; he saw the automobile up there and several men were around it; the truck was at the material yard at the time of the accident, which yard is north of the tool shop, further away from the bridge than the tool shop; there was nothing on the by-pass or driveway; material was kept on the work platform and none was on the driveway; the elevation of the work platform and the bridge was the same level; there was a guard rail and a hand rail on the driveway; the guard rail could be likened to the curb on a street with a hand rail above it; the hand rail was attached to the guard rail and was about three or four feet high; the by-pass or driveway was eighteen feet wide; it was wide enough for two way traffic and witness has seen traffic going two ways every day.

Cross-examination:

The truck was being loaded with lumber at the yard; the truck would be loaded late in the afternoon and brought down to the bridge the next morning; the hoisting engine was setting on the falsework of the bridge, right beside the work platform; a small portion of the hand rail in the center of the work platform was down; the truck
42 would back onto the work platform and the wheel guard and hand rail would be taken down to permit this; the wheel guard was toe-nailed to the floor; after a truck had unloaded, the wheel guard or guard rail and the hand rail would be replaced and fastened in place; as a general rule, whoever was in charge on the work platform would replace the guard rail and the hand rail; the guard rail was always put back, sometimes the hand rail was not; gravel and material were delivered to the job the days we were pouring concrete.

Thereupon the plaintiffs, to maintain the issues on their part joined, called as a witness one **Calvin Durham**, who testified substantially as follows: that he was employed on the bridge job the day Mr. Williams and Mr. & Mrs. Myers were hurt; he was at the yard at the time of the accident loading forms on the truck; there was only one Ford truck on the job.

Cross-examination:

There had not been any other trucks hauling materials to the job for a week before the accident; the Ford truck was used to haul forms and no other material; the week before the accident we were building forms and fixing to pour concrete.

Thereupon the plaintiffs, to further maintain the issues on their part joined, called as a witness one **Matthew L. Lloyd**, who testified substantially as follows:

That he resides at Rockville, Virginia; that he is now engaged in farming and in November 1926, he was employed on the Hunting Creek Bridge job; that he worked on bridges for three years; the accident happened about 3:00 P. M. in the afternoon, Saturday, November 6th, 1926; the by-pass or driveway was wide enough for two cars to pass; busses

went over there regularly; there was no gravel, sand, pipe, or rubber hose on the driveway the day of the injury; he saw the automobile knock Mr. Williams down the second time on the work platform, which was next to the
43 new bridge; he caught Mr. Williams to keep him from falling into a hole; witness had just come out of this hole; the hole was where they had excavated to put in a footing; witness heard a woman scream and he went to the assistance of Mr. Williams and did not see Mr. and Mrs. Myers; it was a clear and dry day; there was a wheel guard around the driveway six inches by six inches; the wheel guard and hand rail would be removed to permit trucks to back onto the work platform; the truck would back onto this platform and dump material; at no time was any pipe, hose or material on the driveway; it was the duty of every man on the job to see to it that nothing was on the driveway; a gang of men were lifting the front part of the automobile up; the truck was at the yard, about three hundred yards away, at the time of the accident; the driveway had easy turns; we had to put the handrail back after the accident where it was knocked down; Penn and witness took Mr. Williams to Dr. Warfield's office in Alexandria; Mr. Williams was away from the job sometime; when he returned he did not stay on the job as he usually had done, and he complained of one of his legs.

Cross-examination:

Witness did all kinds of work during the week in building the bridge; carpenters from Alexandria built the forms; when pouring concrete we had all the ingredients on the job, but no material was kept on the job; it was dumped on the platform to be mixed; the job was about half finished at the time of the accident; witness and laborers were down in the hole cleaning the mud out to put in forms and had been in that particular hole about ten days or two weeks; the hand rail was nailed to the wheel guard when a truck was not on the work platform; the wheel guard was nailed down with heavy spikes and this wheel guard was taken up each time we wanted to back a truck onto the work platform; while unloading a man would guard the opening; John Myers was working on the job but witness did not recall seeing him the day of the accident.

44 That then and thereupon the plaintiffs offered in evidence the original Pleas of the defendant, to which offer objection was made by defendant, which objection was sustained and exception noted by plaintiffs.

Thereupon the plaintiffs, to maintain the issues on their part joined, called one **Edward R. Deane**, who testified substantially as follows:

That he is Title examiner and custodian of records, Department of Vehicles and Traffic of the District of Columbia; that he was under subpoena duces tecum, responding for Mr. L. P. C. Roberts and had with him certain records of the traffic bureau of the District of Columbia, being an application for a set of automobile tags for an automobile, issued in the name of Samuel Rubenstein for a Buick sedan, engine No. 1717129; the car was purchased new on August 5th, 1926 by Samuel Rubenstein; the record shows this car was transferred on an Auburn car and the Auburn car was purchased in the name of Samuel Rubenstein.

Cross-examination:

There was no title law in the District of Columbia in 1926; the law went into effect in July 1931.

45 That then and thereupon the Brief of Appellant in the Court of Appeals in the case (Defendant here) in which he admitted ownership of the automobile in question, was offered in evidence by plaintiffs. Objection was made to this offer by defendant and this objection was sustained and an exception noted.

Whereupon the plaintiffs announced their cases closed.

Whereupon Counsel for the defendant moved the Court to direct the jury to return a verdict for the defendant for the following reasons:

(1) Because there was no proof of this car being purchased or used for family purposes.

(2) Because under the decisions of the Virginia Courts, there could be no liability on the part of the defendant.

(Following discussion of the Motion:)

The Court: "Without saying what I might think of that testimony as a juror, don't you think it is sufficient to submit it to them?"

Mr. Quinn: "If your Honor has any doubt about this question of the family purpose doctrine, before final disposition of this motion I would like to recall this young man to the stand long enough for further cross examination."

The Court: "I will allow you to do that. Is he here?"

Whereupon **Everett Kelly**, being recalled by defendant for further cross examination, testified substantially as follows:

That the day he called to see Mr. Rubenstein on 23rd Street, he left a little pamphlet on "Controlling Humidity in Your House", and a little card in connection with the radiator business he was interested in, at the place; that upon being shown this little pamphlet by Counsel for Defendant, witness denied that the brother of defendant had written anything on this pamphlet while witness was there; he denied he made any statement to the brother of defendant that plaintiff, Mrs. Florence E. Myers was flatfooted or that plaintiff John Myers had been discharged
46 and stated he never knew these people; witness remembered the conversation with Mr. Samuel Rubenstein and his brother because that was the only time he was in conversation with them.

Whereupon the Court instructed the Jury to return verdicts in favor of the defendant in each of the three cases.

An exception was duly noted and notification was given of plaintiffs' intention of appeal to the Court of Appeals.

The foregoing is the substance of all the testimony offered at the trial of the cases.

Be it further remembered that all of the exceptions set out in the foregoing were severally made and entered at the time they severally purport to have been made and entered and were duly noted by the Court on its minutes at the time; and the plaintiffs move the Court to sign this, their Bill of Exceptions, to have the same force and effect as to each and every of the said exceptions, which motion is granted; and the Court accordingly signs this, the Plaintiffs' Bill of Exceptions, to have the force and effect as aforesaid, now for then, this 10th day of April, 1933.

JAMES M. PROCTOR,

Justice.

47 To Henry I. Quinn, Esquire,
Attorney for defendant,
Woodward Building,
Washington, D. C.:

Take notice that the Bill of Exceptions in the above entitled causes, copy of which is hereto attached, will be submitted to the Court for approval on Monday, April 10th, 1933, at ten o'clock A. M. or as soon thereafter as Counsel may be heard.

THOMAS A. WILLIAMS,
ALBERT D. ESHER,
Attorneys for Plaintiffs,
Chandler Building, Washington, D. C.

Service of copy of the foregoing Notice of Bill of Exceptions acknowledged this 10th day of March, 1933, without waiving any rights to move to dismiss appeal for failure to comply with Rules of Court with reference to appeals.

HENRY I. QUINN,
Attorney for Defendant.

[Endorsed:] No. 73338, No. 73339, No. 73340. Robert K. Williams, Plaintiff, vs. Samuel Rubenstein, Defendant. Florence E. Myers, Plaintiff, vs. Samuel Rubenstein, Defendant. John Myers, Plaintiff, vs. Samuel Rubenstein, Defendant. Consolidated. Plaintiffs' Bill of Exceptions. Thomas A. Williams, Albert D. Esher, Attorneys for Plaintiffs, Chandler Building, Washington, D. C. Filed Mar. 10, 1933. Frank E. Cunningham, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5992. Robert K. Williams, appellant, vs. Samuel Rubenstein et al. No. 5993. Florence E. Myers, appellant, vs. Samuel Rubenstein et al., and No. 5994. John Myers, appellant, vs. Samuel Rubenstein et al. Court of Appeals, District of Columbia. Filed Jun. 26, 1933. Henry W. Hodges, Clerk.

SEP 15 1933

Harvey H. Bridges

CLERK

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

No. 5992. No. 5993. No. 5994.

ROBERT K. WILLIAMS, APPELLANT,

vs.

SAMUEL RUBENSTEIN, APPELLEE.

FLORENCE E. MYERS, APPELLANT,

vs.

SAMUEL RUBENSTEIN, APPELLEE.

JOHN MYERS, APPELLANT,

vs.

SAMUEL RUBENSTEIN, APPELLEE.

BRIEF FOR APPELLANTS.

THOMAS A. WILLIAMS,
ALBERT D. ESHER,

Attorneys for Appellants.

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JOHN MYERS, APPELLANT,

vs.

SAMUEL RUBENSTEIN, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

These are appeals from judgments of the Supreme Court of the District of Columbia entered upon verdicts of the jury in three suits for personal injuries sustained by appellants because of the negligent operation of an automobile owned by appellee, Samuel Rubenstein, and operated by his wife—the court directing the jury to bring in verdicts for defendant. The suits were consolidated for trial. One of the appellants, Robert K.

Williams, was a general contractor engaged in constructing the highway bridge over Hunting Creek, just South of Alexandria, in the State of Virginia, on November 6th, 1926, (Rec. pp. 23-24-22). Appellant, John Myers, was employed as a workman on the bridge and his wife, Florence E. Myers, the other appellant, was there with him on personal business (Rec. pp. 28-32); all of the appellants together with a Mr. Ramsey, a Bridge Inspector for the State of Virginia, and Mr. Kinnier, Virginia State Highway Engineer, were standing off the roadway out of the lane of traffic on the bridge, on a work platform which adjoined the temporary roadway used for automobile traffic during construction of the bridge. This platform upon which the appellants were standing at the time they were run into and injured by the appellee's automobile was separated from the temporary roadway by a guard rail, likened to a street curb (Rec. p. 33) and a hand rail as well; the temporary roadway was sufficiently wide for two-way traffic and was used continuously by the public, including the large Interstate buses (Rec. pp. 23-24-28-33).

The automobile which ran into and injured the appellants was owned by the appellee and was operated by appellee's wife and riding with her in the car was appellee's son and a friend of the family, Mrs. Ida Witkowski, and her infant daughter. The automobile was being driven under the appellee's general permission and consent and was being used for the pleasure and convenience of the appellee's family at the time, having been purchased and used as a family car (Rec. p. 31) also (Rec. p. 29). The injuries were caused by the gross carelessness and negligence of the driver in driving at an excessive rate of speed under the traffic and conditions existing and losing control of her car, causing it to leave

the roadway and crashing through the guard rail and hand rail onto the work platform and into appellants (Rec. pp. 22-23-24-28-32-34-35).

These suits were originally filed and tried by the plaintiffs against the defendant, Samuel Rubenstein, and his wife, Pauline Rubenstein, under the family purpose doctrine, and to support that doctrine, at the previous trial before Mr. Justice Bailey, plaintiff called as a witness the then defendant, Pauline Rubenstein, and she testified (Rec. p. 29) "that she was accustomed to driving this automobile with the permission and consent of her husband about Washington and the surrounding territory, and that the automobile in question was purchased and owned and used by her and her husband as the family car." And the defense, at said trial before Mr. Justice Bailey, was not that the car was not a "family purpose" car, or that it was not so being used at the time; but was, that the truck of the plaintiff deflected the automobile driven by Mrs. Rubenstein by colliding with it and thereby putting it out of control and one of the plaintiffs caused the accident himself.

Defendant (Appellee here) contended at the previous trial that the "family purpose" doctrine did not apply in Virginia.

In an attempt to get together on the Bill of Exceptions, plaintiffs' Attorney tendered a draft, and defendant's Attorney tendered a draft of proposed Bill of Exceptions; the respective Attorneys could not agree on the final draft and the Trial Justice instructed the Attorney for the defendant to draw up a Bill of Exceptions for the Court's signature, by including in the same the substance of the testimony on behalf of the plaintiffs (to be copied from the plaintiffs said draft) and the substance of the testimony offered by the defendant (to be copied from

said defendant's draft); and subsequently when the Bill of Exceptions was tendered for signature of the Trial Justice, the Court assumed that such Bill was in accordance with the Court's said instructions and signed the same.

When the case came to this Honorable Court, it was found that Counsel for defendant had left out of the Bill of Exceptions the evidence of "family purpose," as contained in the testimony of witness Mrs. Pauline Rubenstein, wife of the defendant Samuel Rubenstein.

See Certificate of Mr. Justice Jennings Bailey annexed to the "Petition for enlargement or Amendment of the Bill of Exceptions," filed in this Court on April 6th, 1932, in Cases Nos. 5330, 5331 and 5332. After the record had been deleted of the "family purpose" evidence, the defendant assumed the position in this court that there was no evidence of "family purpose" in the case. See page, 5, brief for appellant, cases No. 5330, 5331 and 5332 of this Honorable Court where counsel for the defendant says:

"The above assignments of error present for the consideration of this court but one proposition; viz, was the family purpose doctrine applicable to *the facts of this case?*"

At the last trial of these cases, the plaintiffs called said Mrs. Pauline Rubenstein, wife of the defendant, as a witness, as was done in the previous cases. She proceeded to deny—see page 20 of the record, that she had testified that the automobile in question was owned by her husband; that she was driving it with his permission or consent, or that she was accustomed to driving it with his permission and consent about Washington and the surrounding territory. She further denied that the automobile in question was purchased and owned and

used by her and her husband as a family car. She proceeded to say that the automobile was owned by the Plant, an establishment of her husband, and another partner, notwithstanding the previous record in the lower court that she had testified to all of these facts (Rec. p. 29).

It is not desired to extend this statement of facts too long, but counsel deem it necessary to make it ample in order to place this matter fully before this Honorable Court. The original defense papers filed by the defendant in these cases show admission of ownership of the car by the defendant, Samuel Rubenstein (Rec. pp. 6-12-16-36). In addition to that plaintiffs offered as evidence of ownership, affidavit of Mrs. Pauline Rubenstein filed in these cases (Rec. p. 29) swearing to the fact that her husband owned the car. The original Brief filed by Counsel for the defendant in this Honorable Court in the previous cases, admitting ownership in the defendant (Rec. p. 36). The plaintiff proved further that Samuel Rubenstein admitted it was his family car that injured the plaintiffs (Rec. p. 21).

As will appear from the cross-examination of plaintiff's witnesses the main defense in these last cases was that plaintiff, R. K. Williams, had left material on the roadway or driveway of the bridge which obstructed defendant's automobile; that one of his trucks had figured in the collision with defendant's car so as to contribute to the collision; that the driveway was not wide enough, and after all of this evidence was introduced defendant's counsel moved the lower court to direct a verdict for the defendant on the following grounds:

1. "Because there was no proof of this car being purchased or used for family purposes."

2. "Because under the decisions of the Virginia Courts, there could be no liability on the part of the defendant" (Rec. p. 36).

At first the Trial Court apparently did not think much of the position of Counsel for the defendant, for it stated (Rec. p. 36):

"Without saying what I might think of that testimony as a juror, don't you think it is sufficient to submit it to them?"

Counsel for the defendant replied (Rec. p. 37):

Mr. Quinn:

"If your Honor has any doubt about this question of the family purpose doctrine, before final disposition of this motion I would like to recall this young man to the stand long enough for further cross-examination."

The calling of the witness, Kelly, (Rec. p. 37) for further cross-examination by Counsel for the defendant only emphasizes the fact of the verity of Kelly's testimony, for Kelly recognized a pamphlet which Counsel for the defendant handed him which advertised his products as the one he had left with the defendant on the day of his visit to defendant's establishment, trying to sell to the defendant; and, of course, this testimony did not in any way disturb the evidence of the "family purpose" car then in the Record, and tended to corroborate and strengthen the witness's testimony. However, the lower Court, notwithstanding the testimony, directed verdicts for the defendant.

ASSIGNMENT OF ERRORS.

Appellants assigned errors by the Trial Court in the following particulars:

1. In sustaining defendant's Motion for a directed verdict at the conclusion of the plaintiffs' cases.

2. In holding that the evidence in these cases was not sufficient to establish the relationship of principal and agent or Master and Servant, under the laws of the State of Virginia.

3. In holding that the "Family Purpose" doctrine is not recognized in the State of Virginia.

4. In refusing to hold that the "Family Purpose" doctrine, as recognized by the State of Virginia, applied to these cases.

5. In refusing in evidence the Pleas of the defendant, filed in the Supreme Court, and the Brief filed by defendant in the Court of Appeals of the District of Columbia, on March 6th, 1931.

POINTS.

Points in the case are whether or not the "Family Purpose" doctrine exists in the State of Virginia; whether or not defendant can assume inconsistent positions in the same case; whether or not the Court properly ruled out certain evidence; and the granting of the Motion for directed Verdicts.

ARGUMENT AND AUTHORITY.

These cases are not new to this Honorable Court, as has been heretofore stated, and were sent back for re-trial only because the record in the previous cases lacked the evidence of the "family purpose" car, which evidence

was left out by the defendant's counsel, who was charged by the trial court with re-copying the bills of exception, which contained this evidence.

The opinion of this Honorable Court in cases Nos. 5330, 5331 and 5332 by Mr. Justice Groner, distinguishing between the *Litz vs. Harmon* decision, 151 Va., which applies the "family doctrine" to a family purpose car, and *Green vs. Smith*, 153 Va., where the evidence failed to prove that the automobile was a family purpose car, says:

" . . . the case (*Green vs. Smith*) is distinguished from the *Litz* case upon the ground that in the latter the evidence showed the automobile was bought and kept for family purpose use and that the son had general permission to use it when he liked.

Whether the distinction is more fanciful than real is not of importance, for it is obvious that the most that can be deducted from the Virginia decisions on the subject of the family purpose doctrine is that it is applicable only in those cases in which it is shown that the automobile belonging to the head of the family was acquired for general family use and was indiscriminately so used, and in this aspect, under the facts shown in this case, the doctrine would not apply, for here the evidence wholly fails to show that the automobile being driven by the wife was bought or maintained for family purposes or was so used. . . ."

Had the evidence in the instant cases, on the previous hearing before this Honorable Court, of the "family purpose" car, being purchased and used for such, been in the record at the time of the writing of the opinion in the previous cases, this Honorable Court would no doubt have sustained the verdicts in the previous cases.

It is safe to say now that since this record has said evidence, this Honorable Court will hold the action of the Trial Court to be in error in directing verdicts for the defendant.

The injury in *Litz vs. Harman* occurred on August 5th, 1926. The instant injuries occurred November 6th, 1926, ninety days afterwards. Therefore, using the language of His Honor, Mr. Justice Groner:

“Since in this case we are only called on to ascertain the Virginia rule of liability, applicable *as of the time of the injury*. . . .”

the *Litz vs. Harman* case is ruling in the instant cases. The opinion in the *Litz vs. Harman* case does not show the exact date of the injury in that case, but does refer to the fact that the case was tried twice and in the second trial, which is the opinion reported in 151 Va., there are dates of May, 1927, having reference to certain affidavits about the conduct of jurors in the second trial of that case. As the date of the injury in the *Litz-Harman* case may be of importance, Counsel will present at the bar of this Court the printed record used in that case wherein is set out the date of the injury. We thus have the best of authority for the rule in Virginia: that of *this Honorable Court*.

That the doctrine in Virginia may be fully appreciated we refer at length to the case of *Litz vs. Harman*, 151 Va. 363, 144 S. E. 477. In this case the Court of Appeals of Virginia fully and directly considered the “family purpose” doctrine and reviewed and discussed the first two cases relied on here by appellee; that is *Cohen vs. Meador*, *supra*, and *Blair vs. Broadwater*, *supra*, and after such mature consideration the court fully approved

the "family purpose" doctrine. Thus it is the law of the State of Virginia. The court stated, 151 Va. p. 364:

"The instant case arose out of an automobile accident. The automobile of defendant was kept for family purposes. At the time of the accident, at the mother's request, the automobile driven by her son was being used to take groceries to a camp at which one of her daughters was staying, and, on the return from the camp the accident happened. The son lacked a few days of being twenty-one.

"Held: That the 'Family Purpose' Doctrine applied and that the son was acting as agent for his father, and the father was liable for the negligence of the son."

At page 376 the court says:

"The defendant assigns numerous errors, but all except one center upon one proposition. It is contended that the driver of the automobile, the son of defendant, was not his agent or servant, and hence that the defendant can in no event be held legally responsible for the plaintiff's injury. For this, two cases are cited and relied upon. They are: *Cohen vs. Meador*, 119 Va. 429; *Blair vs. Broadwater*, 121 Va. 301, 89 S. E. 532; *L. R. A. 1918a, 1011*. In each of these cases a father, the owner of the automobile, was relieved of liability for the alleged negligence of the driver of the automobile, which in one case was operated by a son over twenty-one years of age and in the other, by a daughter eighteen years of age.

"The rule established by those cases is thus expressed:

"The relationship alone of father and son, or father and daughter, does not of itself impose liability upon the father for the negligent operation of his automobile, and such liability, when properly imposed, must result from the relation of master and servant or principal and agent."

"That is all those cases can be fairly held to determine, and we do not wish to modify or weaken that rule, which, however difficult it may be to apply in particular cases, appears to be a universal rule in this country.

"There is a wealth of authority on the general subject and much conflict. Out of these precedents, however, a rule supported by the *better reason*, and as we believe, by the weight of authority, has emerged, which has come to be labeled as the "family purpose doctrine," as affecting liability for negligent injuries by automobiles while being used by members of the family."

And at page 379 of the same opinion:

"The rule has been said to rest on the view that where a father provides an automobile for the purpose of furnishing members of his family with outdoor recreation, the use of the car for such purpose is within the scope of the father's business and analogously to the furnishing of food and clothing or administering to their health."

And the court further states at page 379:

In Ruling Case Law, Supp. Vol. 4, page 153, this is said as to the 'family purpose' doctrine:

"When the head of a family supplies an automobile for the use and pleasure of the family, permitting the members thereof to use it at will, those members thus using the automobile become the agents of the head of the family, as each one using it, even for his sole personal pleasure, is carrying out the purpose for which the automobile was furnished, and is the agent or servant of the head of the family, so that the latter is liable for injuries resulting from negligence."

And on page 381 the court says:

“The discussion might be prolonged and citations multiplied, but we shall content ourselves with saying that we agree with the judge of the Trial Court in holding that under the facts in this case the ‘family purpose’ doctrine applies. The automobile was being used at the time by three members of the family of the defendant (wife, son and daughter) for the purpose for which it had been bought, under the *implied* authority of the defendant so as to make his son the driver of the machine for the time being, his servant and agent.”

That Virginia is a family purpose state, see last edition of the Digest of Virginia and West Virginia Reports, by Michie, Vol. 1, edited 1929, *Sec. 16*, page 895.

This section is under the head “Automobile” and has the short head “Family Purpose,” and under this sub-head is quoted the Litz-Harman case, 151 Va. 363 and it takes its place in the States having “family purpose” doctrine, as outlined in such cases, as Eggleston *vs.* Kendall, 92 W. Va., 114 S. E. 454; Jones *vs.* Cook, 90 W. Va. 710, p. 715; 111 S. E. 828; Ambrose *vs.* Young, 100 W. Va. 452; 130 S. E. 810.

30 N. C. C. A., page 341, places Virginia in the States known as the “family purpose doctrine” States. Virginia takes her place under the authority of the Litz-Harman case with such States as Texas, Kentucky, W. Virginia, Illinois, North Carolina and many others.

The courts in Virginia all recognize the “family purpose” doctrine, where the evidence supports that doctrine as in the instant case.

The evidence in the instant cases fully sustains the “family purpose” doctrine.

Witness, Kelly, at page 31 of the record, says, substantially:

“That he went out to the place where Samuel Rubenstein had his place of business to sell him some radiator covers; that he had gotten a tip that he might make a sale, at that time representing the Tri-Co Radiator Covers. That he first talked with the brother of Samuel Rubenstein and about that time Samuel Rubenstein came up. ‘Witness asked brother of the defendant if he was the Rubenstein who had hit Mr. Williams in Alexandria and he told witness that he was not the one but that it was his brother’s car; defendant, Samuel Rubenstein then said it was the family car or his car; defendant said it was the family car.’ ”

See Rec. p. 29 where Counsel agreed that if Mr. Justice Jennings Bailey was present in Court as a witness for the plaintiffs, he would testify substantially as follows:

“That Mrs. Pauline Rubenstein in her direct testimony when called as a witness for the plaintiffs in the previous trial testified as follows:

“That she was accustomed to driving this automobile with the permission and consent of her husband about Washington and the surrounding territory and that the automobile in question was purchased and owned and used by her and her husband as the family car.”

See Rec. p. 30 where Stanley H. Horner, Inc., Buick automobile representative in Washington, through its vice-president, Walter Duffy, testified that he was under subpoena duces tecum to bring the record of his firm of the purchase of this Buick sedan by Samuel Rubenstein and his records show that on August 5th, 1926, Samuel Rubenstein purchased of the firm a Buick Sedan, 1927

model, engine No. 1717129, purchase price being \$2,215.00. On cross-examination counsel for the defendant attempted to prove by him that the automobile taken in by his company in trade at the price of \$225.00 was owned by the *Rubenstein Cleaning Company* and this witness testified:

“Witness had reason to believe that the second-hand car on which was allowed \$225.00 in trade *was not owned* by the Rubenstein Cleaning Company; that he was with Horner Company at the time; the purchase price of the new Buick was \$2,215.00 and the \$1.00 extra was for automobile tags; the application for tags is usually signed by the purchaser; there was no title law in the District of Columbia at the time.”

And at page 36 of the record plaintiff called Edward R. Dean to testify and he stated that he was title examiner and custodian of records, Department of Vehicles and Traffic of the District of Columbia; that he was under subpoena duces tecum representing or responding for Mr. L. P. P. Roberts and had with him certain records of the Traffic Bureau of the District of Columbia, being an application for a set of automobile tags for an automobile, issued in the name of Samuel Rubenstein for a Buick Sedan, engine No. 1717129; the car was purchased new on August 5th, 1926, by Samuel Rubenstein; the records show this *car was transferred on an Auburn car* and the Auburn car was *purchased in the name of Samuel Rubenstein*, and he further testified on cross-examination that the title law went into effect on July, 1931. Which shows that certainly since July, 1931, five years after this injury occurred, *Samuel Rubenstein used the same car with which the plaintiffs were injured and*

transferred it in his own name on the purchase of a new car; the said new car, an Auburn, purchased in his name.

Rubenstein admitted in his pleadings filed in these cases, that it was his automobile; the same thing in the Brief filed in this Court and in the testimony and Certificate of Mr. Justice Bailey, hereinbefore referred to, it is shown that Mrs. Rubenstein admitted it was the family car, so purchased and used. The defendant Samuel Rubenstein was present and heard her so testify and did not deny it; also the proffered testimony of Mr. Albert D. Esher, of Counsel for plaintiff, that Mr. Harry F. Kennedy, previous counsel for defendant, admitted the same thing before the Bar of the Trial Court.

With this abundance of evidence of the "family purpose" doctrine, notwithstanding the turn table methods of the defense, swearing in one case to one set of facts and swearing to the contrary in another, the case of plaintiffs is abundantly proven.

It is to be noted by this Honorable Court that Pauline Rubenstein was a defendant named in these suits and her admissions bound the defendant; that defendant Samuel Rubenstein, her husband, heard her testify at the time Mr. Justice Jennings Bailey was sitting (Rec. p. 20), yet he did not deny the facts that she testified to, that is, that the car was a "family purpose" car, when he afterwards took the witness stand.

Where a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. *White vs. Bott*, 158 Va. 442 at 454; *Ohio &*

M. Ry. Co. vs. McCarthy, 98 U. S. 258, 267; 24 L. Ed. 693; *Oakland U. Co. vs. Wolfe*, 118 Fed. 239; *Goodman vs. Purnell*, 187 Fed. 90; *Heckscher vs. Blanton*, 111 Va. 648-653; *Arwood vs. Hill*, 135 Va. 235; *Robinson vs. Shepard*, 137 Va. 687; *Nagle vs. Syer*, 150 Va. 508.

As was said in *Arwood vs. Hill's Adm.*, 135 Va. 235, "A party cannot, either in the course of litigation or in dealing in pais, occupy inconsistent positions." Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, "to approbate and reprobate."

The time to speak is when one should and if he thereupon fails and holds his peace it is assumed that what he would say would be unfavorable to him. See *Murphy Hotel Co. vs. Herndon Adm.*, 120 Va. 505, at 517, where it is stated:

"When a defendant can, by his own testimony, throw light upon matters at issue necessary to his own defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised and will be given effect that the facts do not exist."

Therefore, Rubenstein's failure to deny in the previous trial what his wife had testified to in his presence, that his car was a family car, so purchased and used, gives force and effect to her binding statements, and, now that he realizes that the law of Virginia recognizes the "family purpose" doctrine, estops him from denying what she had previously testified to.

Assignment of Error No. 5 refers to the refusal of the Court to allow in evidence the judicial admission made in the Pleas of the defendant as to his ownership of the car and the admission in the Brief filed in this Court.

1 Ency. Evidence, 396, Sec. 8, says:

“A judicial admission is one so made in pleadings filed or in the progress of a trial as to dispense with the introduction of evidence otherwise necessary or to dispense with some rule of practice otherwise necessary to be observed and complied with.”

1 Greenleaf Evidence, Sec. 27, 205; *Cook vs. Gurokin*, 119 N. C. 13-25 S. E. 715 it is said that:

“Judicial admissions or those made in Court by the party's attorney, generally appear either of record, as in pleading, or in the solemn admission of the attorney, made for the purpose of being used as a substitute for regular evidence of the fact at the trial, or in a case stated for the opinion of the court. . . .”

In connection with the admission of Counsel for the defendant at the first trial, Mr. Harry Kennedy, it will be found that in the first record there was no question raised as to the fact that the car was not a “family purpose” car, nor did Samuel Rubenstein deny the fact upon the stand.

The testimony in the previous trial on the part of Mrs. Rubenstein, who was then a defendant, that the car was a “family purpose” car so purchased and used by her and her husband, she being a joint defendant with her husband at that time, was binding upon him as well as herself. See 4 App. D. C. 51, *Maine vs. Ankan* where it is said:

“Declaration made by one with the knowledge and sanction of others in respect to a matter in which all are interested bind all.”

See Wigmore on Evidence, Sec. 1079 (2) page 593, where it is said:

“The admissions of one joint tortfessor are receivable against another. . . .”

That the court erred in refusing to admit admissions of counsel for defendant, see *Darkin vs. Brundige*, 276 U. S. 36, 48 L. Ed.

The statements of Pauline Rubenstein bind the defendant even though made out of court. This question is definitely determined in the case of *Buchanan vs. Wilson* (Va.) 165 S. E. 422 at 424. West was the driver of the car and Miss Fannie Wilson the owner. West was asked after the accident, “Who do you work for?” He said, “Miss Fannie Wilson.” And our Supreme Court said:

“Much was said in the Brief as to whether this statement is or is not a part of the *res gestae*. Regardless of this we think it was proper and admissible testimony as tending to establish the fact that West was the agent of Miss Fannie Wilson.”

These cases being tried under Virginia Law, this authority is imperative:

“Bills of Exception usually embody so much of the testimony as is needed to be laid before a superior court in order to enable it to understand and rule upon the questions of law raised by the exceptions, it is signed by the trial judge, partly (at least) in token of his approval of it as a fair representation of the issues raised. May it not therefore be regarded as an official statement by the Judge of the tenor of the testimony whenever in another trial (even between other parties) it may be desired to prove the parts of the testimony stated in the bill.”

In *Baylor vs. Smithers*, 1 T. B. Mon. 6 it is said:

“The statement contained in a bill of exception must be supposed to have undergone not only the inspection of each party or their counsel, but moreover the scrutiny and supervision of the court, by whom the exceptions are signed. When enrolled those statements in fact compose part of the record and are entitled to as much verity and are deserving as much credit as would be the testimony of any witness who might prove what the witness whose statements are contained in the record proved on a previous trial.”

And at page 502 Wigmore says further:

“The majority of courts, on one ground or another, receive the bill to prove the tenor of the former testimony.

From the view of practical safety the question is a difficult one to settle by a general rule, and must depend much on the local professional methods. But it seems clear, so far as principle is concerned, that where the parties to the later trial are (as in the usual case) the same in interest, the signing of the bill of exception in the first trial is an admission of the correctness of its statements, and the objections that the admission was intended for that trial only . . . may affect its weight but not its admissibility. . . .”

The Court therefore erred in refusing to let in the Bill of Exceptions.

As the “family purpose” doctrine is founded upon agency, that is “where the head of a family supplies an automobile for the use and pleasure of the family, permitting the members to use it at will, those members thus using the automobile become the agents of the head of the family. . . .” *Litz vs. Harman*, 151 Va. p. 379.

It is apropos of this note to cite the case of *Sydnor & Hundley*, 158 Va. 703 at 706 where it is said:

“Though some courts have held to the contrary, the present majority rule is that in an action for injuries caused by the negligent operation of an automobile, proof that the automobile was owned by the defendant at the time of the accident establishes a *prima facie* case for the plaintiff; in other words, from proof of the defendant’s ownership; a rebuttable presumption or inference arises that at the time of the injury the automobile was being operated by the defendant’s servant or agent, or someone under his control, and that the relation of master and servant, therefore, existed between them. *Potts vs. Parder*, 220 N. Y. 431, 116 N. E. 78, 8 A. L. R. 785.”

Guthrie vs. Holmes, 272 Mo. 215, 198 S. W. 854, Ann. Cases 1918 D 1123; *West vs. Kern*, 88 Ore. 247; 171 Pac. 413 . . . also 42 A. L. R. 900 et seq.

In *Vartanian on the Law of Automobiles* (a Virginia book), Section 121, this is said:

“The inconvenience, the difficulty and in most cases the impossibility to the plaintiff to prove by affirmative evidence that the driver of the automobile was acting under the control and direction of the owner, and was therefore his servant, have led some courts to the adoption of a more rational rule in the application of the general principle above stated. According to that rule, while it is still incumbent upon the plaintiff to make a case by the preponderance of evidence that the driver was the servant of the owner, he need not particularly show that the driver was acting under the control and direction of the owner. It is *prima facie* sufficient to show that the automobile was owned by the particular person and was at the time, being driven by the particular person. Under such evidence the law *prima facie* presumes that

the driver was acting as the servant of the owner.

With the above rule we are in accord, and are therefore of the opinion that the trial court was right in denying the defendant's motion to strike, as it did."

The evidence in the instant cases went farther than that. It went so far as to prove the ownership in defendant, and that the car was a family car and so purchased—and even so far as to prove that defendant has taken inconsistent positions. Yet, the lower court sustained a motion for directed verdicts, which motion was made in face of the law to the contrary. Under this authority, it being a Va. decision it was imperative. The Trial Court had no alternative but to submit the question to the jury.

Defendant may contend that agency is not presumed—that is not the law in Virginia—see *Sydnor & Hundley*, 158 Va. supra. Where it is positively and directly held that a presumption arises when an accident occurs that the driver is the agent of the owner.

RESUME.

Appellants feel that the Litz-Harman case positively and definitely established the "family purpose" doctrine in Virginia, and that this Honorable Court recognizes it in its decision on the former appeal of these cases (Nos. 5330, 5331 and 5332), and that its decision in those cases was based solely on the fact that the evidence before the Appellate Court was insufficient to sustain a verdict under this doctrine.

In this appeal we confidently assert that the evidence in this record consisting of the testimony of the witness, Kelly; the testimony of Honorable Justice Jennings

Bailey; the Pleas filed in these cases in the trial court; the proffered testimony of Albert D. Esher, as to judicial admissions made at the Bar of the court during the trial of the "family car;" the testimony and records of the witness, Walter Duffy, as to the defendant's ownership of the car; the testimony and records of the witness, Edward R. Dean, the Custodian of Records of the Traffic Bureau of the District of Columbia, as to the defendant's ownership of the car, the Brief filed in this Honorable Court by the defendant admitting ownership of the car, is conclusive that the defendant owned the car involved in this accident and that it was generally used by his wife, who was operating it at the time of the accident, that it was the "family car," bought and used for family purposes.

Especially when considered in the light of the Sydnor & Hundley case, *supra*, holding a presumption of agency arises from the fact of ownership. And in the light of the Buchanan *vs.* Wilson case, *supra*, holding the agency may be proved by the statements or admissions of the agent out of court.

And we respectfully submit in conclusion that the Trial Court erred in sustaining the motion of the appellee to direct verdicts for the defendant in these cases and pray this Honorable Court to reverse the judgments entered by the Trial Court in these cases.

Respectfully submitted,

THOMAS A. WILLIAMS,
ALBERT D. ESHER,

Attorneys for Appellants.

OCT 9-1923

IN THE

Henry H. Dodge

CLERK

Court of Appeals of the District of Columbia

No. 5992.

No. 5993.

No. 5994

ROBERT K. WILLIAMS, *Appellant*,

VS.

SAMUEL RUBENSTEIN, *Appellee*

FLORENCE E. MYERS, *Appellant*,

VS.

SAMUEL RUBENSTEIN, *Appellee*

JOHN MYERS, *Appellant*,

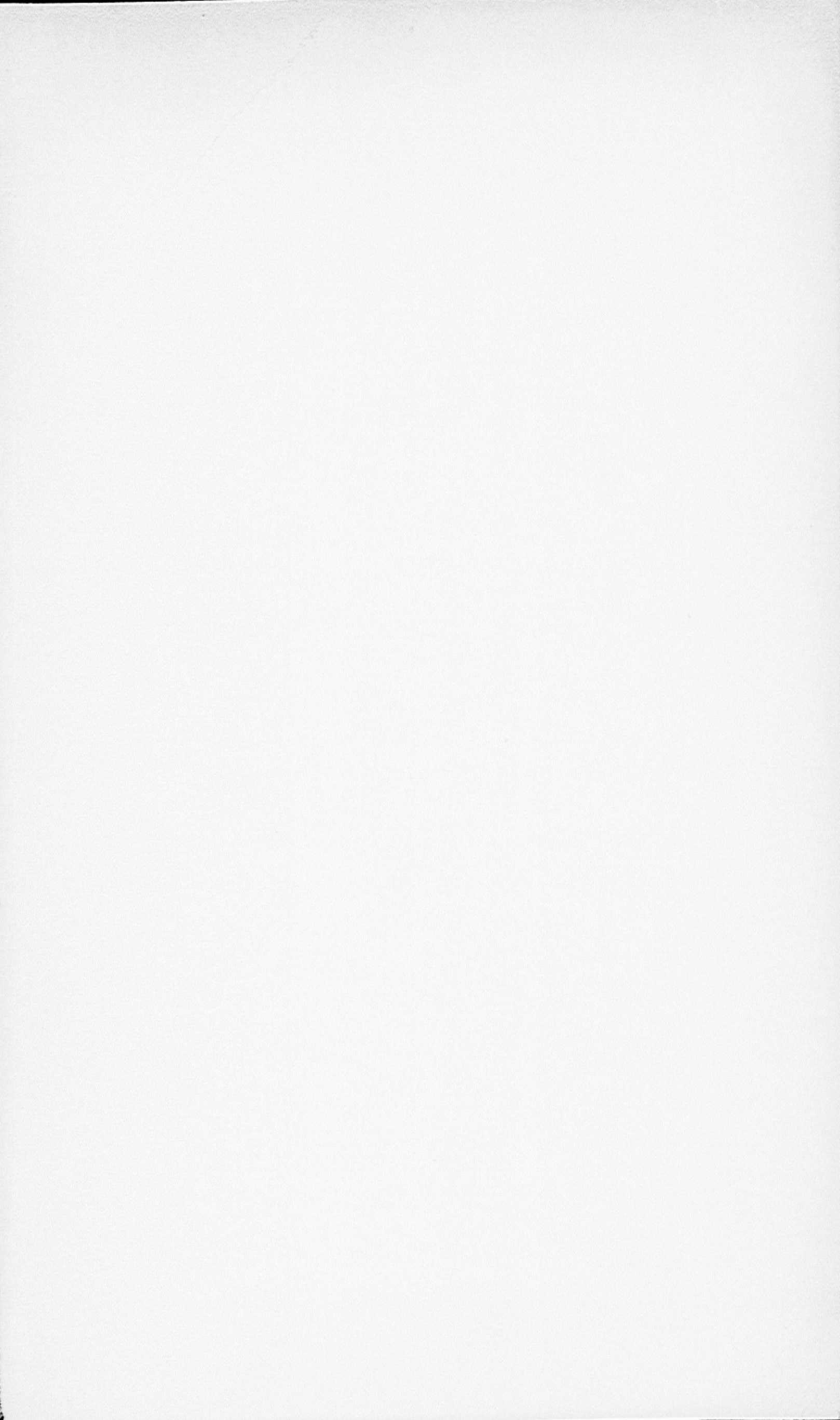
VS.

SAMUEL RUBENSTEIN, *Appellee*

BRIEF FOR APPELLEE

✓ HENRY I. QUINN,
Attorney for Appellee.

Henry F. Kennedy



IN THE
Court of Appeals of the District of Columbia

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VS.
SAMUEL RUBENSTEIN, *Appellee*

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JOHN MYERS, *Appellant*,
VS.
SAMUEL RUBENSTEIN, *Appellee*

BRIEF FOR APPELLEE

STATEMENT OF CASE

These are appeals from judgments of the Supreme Court of the District of Columbia entered upon directed verdicts in three suits for personal injuries. The suits were consolidated for trial.

ISSUES MADE BY THE PLEADINGS

The Declarations alleged that appellee was the owner of an automobile, the use of which he provided for the members of his family; that prior to the hap-

pening of the accident complained of appellee's wife had from time to time operated said automobile for "her pleasure and purposes," and at the time of the accident was driving and operating the same "by virtue of the relationship and conditions existing in the family of the defendant, Samuel Rubenstein (appellee), with reference to the use and operation of said automobile;" that while the said automobile was being operated by said wife in a negligent manner it collided with and caused injuries to appellants. (R. 2.)

Appellee, by his first Plea, in each case, admitted that Pauline Rubenstein was his wife and denied all the other allegations of the Declarations.

EVIDENCE

Appellee refers only to such evidence as is considered pertinent to the question presented in this appeal, which has only to do with the operation by his wife of an automobile, alleged to be his, under the so-called "family purpose" doctrine. The only competent evidence offered on behalf of appellants to show the circumstances and purposes under which and for which appellee's wife was operating the automobile in question was the testimony of the wife, who, being called as a witness by the appellants, testified that she was driving the same at the time of the accident, and that with her in the said automobile were her son, a friend, and the friend's daughter; that she was on her way back from Camp Humphreys; that the automobile was not owned by her husband but belonged to the plant, and that she only drove the said automobile "whenever the plant could spare it" and that she always asked permission of the firm and her husband before she

drove the car. (R. 21 and 22.) In addition to this testimony of appellee's wife appellants offered the testimony of one Everett Kelly, who testified that in a casual conversation at the office of the Rubenstein Cleaning Company, in which appellee was a partner, that appellee told him that the car that had collided with appellant, Williams, was "the family car or his car" (R. 31), and the testimony of an automobile dealer and an employee of the Department of Vehicles of the District of Columbia to the effect that the automobile being operated by appellee's wife was purchased in the name of Samuel Rubenstein on August 5, 1926, (R. 30-36). The testimony of Mr. Justice Bailey, and an affidavit filed by appellee's wife in this cause were received solely for the purpose of contradicting appellee's wife, who had been called as a witness by appellants, and was not affirmative proof of any fact in the case. (R. 21-29.)

QUESTIONS PRESENTED ON THE PLEADINGS AND THE EVIDENCE

The allegations of the Declarations, and the evidence offered in support thereof presented to the Court below, on a motion for a directed verdict, the question as to whether or not there was a prima facie case made out against appellee under the so-called "family purpose" doctrine as construed and applied in the various decisions of the highest court of the State of Virginia, in which State the accident occurred. In a former appeal in these cases (*Rubenstein vs. Williams, et al.*, 61 Appeals, D. C., page 266), this Court held that the rule of law established by the Courts of Virginia governed the right to recover in this case. It is plain from

the Declarations that appellants relied upon the "family purpose" doctrine as the basis of their right to recover, and not upon the law of master and servant or principal and agent as ordinarily understood.

POINT

In Virginia the relationship alone of husband and wife does not impose liability on the husband for the negligent operation of his automobile by his wife, and such liability when properly imposed must result from the relation of master and servant or principal and agent

This point was fully considered by this Court in the former appeal in these cases and approved. (*Rubenstein vs. Williams, Supra.*) Appellants, however, apparently consider that on the second trial of these cases in the Court below they presented some new testimony which presents to this Court a case different from that involved on the former appeal. It is respectfully submitted that it is plain from the record that no new question is presented notwithstanding the many erroneous statements in appellants' brief purporting to be based on said record.

It is of the greatest importance that this Court be not misled by the numerous erroneous statements in appellants' brief. On page 2 of said brief it is contended that the automobile in question was being driven under "the appellee's general permission and consent and was being used for the pleasure and convenience of appellee's family at the time, having been purchased and used as a family car." Pages 29 and

31 of the Record are cited in support of this contention, and when we turn to the record we find no such support. On page 29 it will be found that it was conceded that if Mr. Justice Bailey was present he would testify that appellee's wife had testified at the former trial of these cases, that she was accustomed to driving the automobile with the permission and consent of her husband about Washington, and the surrounding territory and that the automobile in question, "was purchased and owned and used by her and her husband as a family car." That testimony was admitted solely for the purpose of contradicting the appellee's wife as is apparent from the statement of Mr. Justice Proctor appearing on page 21 of the Record when he stated to Counsel for appellant "if you should show that she testified differently, that is not an affirmative proof of anything." All we find on page 31 of the Record is that one Everett Kelly testified that the appellee told him that the automobile which collided with Mr. Williams was "the family car or his car."

On page 3 of appellants' brief we find that the purpose for which the testimony of Mr. Justice Bailey was admitted is again ignored, and his testimony is coupled with various statements as to what took place at the former trial of these cases, for none of which there is justification in the Record.

Present Counsel for the appellee considers it his duty to deal with certain statements made on pages 3 and 4 of the brief which apparently reflect on the former attorney of record of the appellee. The brief states that this Attorney was instructed by the trial Justice to include certain things in the Bill of Exceptions, that the trial Justice assumed his instructions had been followed and signed the Bill as presented, but

when the case came to this Court it was found that the attorney referred to had left out of the Bill of Exceptions the evidence of "family purpose." The brief then goes on to state "After the record had been deleted of the 'family purpose' evidence the defendant (meaning appellee and his counsel) assumed the position in this Court that there was no evidence of 'family purpose' in the case." The language of the brief apparently presents a serious charge against an honorable member of the Bar for which there is no justification in the present record, nor in any other of which present counsel for the appellee is aware. The record in the former case was in the hands of counsel for appellants for over a year before the former appeal was argued in these cases and no question was raised as to the sufficiency of the Bill of Exceptions or the fact that it had been "deleted of the family purpose evidence." It was not until after the decision of this Court on the former appeal that any suggestion was made that the Bill of Exceptions was not complete or that there had been any deletion. It is apparent from the statement of the trial justice that he himself was probably in error as to his recollection of the testimony of appellee's wife at the first trial in the Court below, which trial was not stenographically reported. He took no notes of the testimony, and it was over a year after he signed the Bill of Exceptions that he was requested to give a statement as to his recollection of her testimony. The record in the former trial shows that the appellee's wife was a co-defendant with him, and that at the conclusion of the testimony the Court compelled plaintiffs to elect as to which defendant they would proceed against and they elected to proceed against appellee. Is it likely that would have been done if her testimony

was that the automobile in question "was purchased and owned and used by her and her husband as the family car"?

Again on page 5 the brief states, "she proceeded to say that the automobile was owned by the plant, an establishment of her husband and another partner, notwithstanding the previous record in the lower Court that she had testified to all of these facts" (meaning the fact that the automobile was purchased and owned and used by her and her husband as a family car). Page 29 of the record is cited in support of this contention and again reference to page 29 shows that there is no such support found therein.

On page 5 of the brief appellants state that "in addition to that plaintiffs offered as evidence of ownership affidavit of Mrs. Pauline Rubenstein filed in these cases (R. page 29), swearing to the fact that her husband owned the car." This affidavit was admitted simply as a piece of evidence tending to contradict Mrs. Rubenstein and not as an affirmative proof of anything.

ARGUMENT AND AUTHORITIES

There can be no doubt that the "family purpose" doctrine, as ordinarily understood, has been rejected by the Court of Appeals of Virginia.

Cohen vs. Meador, 119 Va. 429.

Blair vs. Broadwater, 121 Virginia 301.

Litz vs. Harman, 151 Va. 464.

Green vs. Smith, 153 Va. 675.

In *Blair vs. Broadwater, Supra*, the evidence showed that defendant "bought and kept the car for the use and pleasure of himself and family," and on the day of the accident he permitted his daughter to use the car for the "pleasure and entertainment of herself and cousin." In its opinion in this case the Court of Appeals of Virginia said:

"Two theories are advanced why the owner of an automobile should be liable for injuries inflicted upon third persons by his minor child while using the machine, with his consent, for the child's own business or pleasure, namely:

"(1) Because the parent is responsible for intrusting a dangerous machine to the hands of his child. This liability, it will be observed, does not depend upon the child's negligence, but upon that of the parent in permitting the child to use a dangerous instrumentality.

"(2) The second theory proceeds upon the assumption that, as the parent originally purchased the machine for the use and pleasure of the family, the use of it by the child with the parent's permission for its own pleasure is but applying it to the business for which it was bought, and therefore the child's use of it was for the parent's business."

Both of the above theories were then discussed and rejected by the Court. In discussing the second proposition the Court, after referring to *Cohen vs. Meador, Supra*, *Doran vs. Thomsen*, 76 N. J. L. *Van Blaricom vs. Dodgson*, 220 N. Y. 111, *Reilly vs. Connable*, 214 N. Y. 586, and numerous other State cases, concludes as follows:

“The general rule in relation to the responsibilities of a parent for the torts of his minor child is very clearly and succinctly stated in *Smith vs. Jordan*, 211 Mass. 269, 97 N. E. 761, as follows: ‘The principles of law which govern this case are plain. A father is not liable for the torts of his minor son simply because of paternity. There must exist an authority from the father to the son to do the tortious act, or a subsequent ratification and adoption of it, before responsibility to the parent. * * * The wrongful act must be performed by the son in pursuance of the business, incident, or undertaking authorized by the father before the latter can be held liable. * * * If the act is not done by the son in furtherance of the father’s business, but in performance of some independent design of his own, the father is not liable. The controlling rules of law are the same, whether the business in question concerns the operation of an automobile, or any other matter.’

“The doctrine of these cases impresses us as being sound, and they sufficiently illustrate the ruling principle that should govern the case in judgment.”

In *Green vs. Smith, Supra*, the “family purpose” doctrine was again injected by the Court of Appeals of Virginia in an opinion in which the following language, clearly presenting its attitude, is used:

“The advent of the automobile has no magic power to change and rewrite the common law with reference to the liability of a father for the negli-

gent use of an instrumentality which he permits his minor son to use; and if experience has demonstrated that the use of automobiles requires that the owner of the automobile be held liable for the negligence of his minor son, or other person, using his automobile with his permission in cases in which he would not be liable were the son, or other person, using some other instrumentality owned by him, the change should come, we think, by act of the legislature and not by Judicial pronouncement. See Section 59, Chapter 54, Laws of New York, 1929."

Litz vs. Harman, Supra, a case relied on by appellants, did not really involve the application of the "family purpose" doctrine, as construed and applied by the Courts of other states. The testimony in that case showed that the father did not drive an automobile, spent a great deal of his time away from home, did not keep a chauffeur and that some of his children always drove the automobile. It was further shown by the testimony that one of the defendant's daughters was at a certain camp, and the defendant's wife was requested to bring down some food to the camp; that the wife and one of the other daughters got the groceries and requested the son to drive them down to the camp with the groceries, and the son, who was driving the car on that occasion, testified that "the car was bought and maintained by his father partly for such errands." On the way back from the camp the accident happened. In deciding this case the Court of Appeals of Virginia said, "the doctrine of respondent superior applies here under the conceded facts." It will also be noted that in the *Litz-Herman* case the

Court of Appeals expressly approved the rule which it had announced in *Cohen vs. Meador, Supra*, and *Blair vs. Broadwater, Supra*.

There is nothing in the record in the instant case to distinguish it in the slightest from the case presented on the former appeal (*Rubenstein vs. Williams*, 61 Appeals, D. C. 266), even though it be conceded that appellants proved everything for which they contend. Their proof necessarily was limited to the allegations of the Declaration, and when those allegations are considered we find that there is no claim made that appellee purchased an automobile for general family use. The allegation simply is that "he was the owner of an automobile, the use of which said automobile said defendant provided for members of his family," which is the equivalent of saying that he permitted them to use it from time to time. There is no allegation in the Declaration that appellee's wife, at the time of the accident, was driving said automobile in the transaction of any business or in the management of the affairs of the defendant. The allegation as to the purposes for which appellee's wife was operating the automobile shows, if it shows anything clearly, that she was operating the same for her own pleasure and purposes and not on any business of appellee, for the declaration states "that prior to the happening of the grievances hereinafter set out, said defendant, Pauline Rubenstein, from time to time, drove and operated said automobile for her pleasure and purposes and on the date aforesaid, defendant, Pauline Rubenstein, was driving and operating said automobile under and by virtue of the relationship and condition existing in the family of defendant, Samuel Rubenstein, in reference to the use and operation of said automobile." In the first trial in

the Court below, and in the former appeal in these cases, appellants relied solely on the family purpose doctrine, and never claimed that appellee's wife was operating his automobile in the transaction of any business for him or as his agent, except as such agency might be involved by the application of the so-called family purpose theory. And in the second trial of these cases in the Court below their position was the same. It is for the first time urged on this appeal that they were entitled to go to the jury on the theory that from proof of appellee's ownership of the automobile, "a rebuttable presumption or inference arises that at the time of the injury the automobile was being operated by the defendant's servant or agent, or someone under his control, and that the relation of master and servant, therefore, existed between them." This contention is founded upon the argument that the "family purpose" doctrine is based upon agency, as its theory is, "where the head of a family supplies an automobile for the use and pleasure of the family, permitting the members to use it at will, those members thus using the automobile become the agent of the head of the family." No such contention was made in the lower Court and the trial justice was never called upon to pass upon the same. It is sufficient answer to it here, where it is made for the first time, to point out that there is absolutely no proof in the record that appellee purchased the automobile in question for the use and pleasure of his family or that he permitted the members of his family to use it at will, and even if there was such proof in this case, appellants were not entitled to have their case submitted to the jury in view of the record which shows that they alleged and proved, if they proved anything, that appellee's wife was using

the automobile for her own pleasure and not on any business for appellee. In this connection we again call this Court's attention to *Blair vs. Broadwater, Supra*, in which, though the evidence showed that the automobile was bought and kept for the use and pleasure of the defendant and his family, and that his daughter was using it, with his permission, for the pleasure and entertainment of herself and cousin, the Court of Appeals of Virginia expressly rejected the theory that, under such circumstances, the member of the family using the automobile becomes the agent of the head of the family.

Appellant's brief further presents the contention that the appellee's wife had testified at the first trial of these cases that the automobile in question was the family car so purchased and used, and that appellee's failure to deny in the first trial what his wife had testified to in his presence estopped him from denying that to which she had previously testified. There are two answers to this proposition:

- (1) There is no affirmative proof in this case that she did so testify, as Mr. Justice Bailey's testimony was received purely for the purpose of contradicting her.
- (2) There is nothing in the record to show that the appellee so heard her testify or failed to deny her testimony.

With reference to the assignment of error Number Five, which refers to the refusal of the Court to allow in evidence the Pleas of the defendant as to his ownership of the car, it will be noted that one of the defendant's pleas denied his ownership of the car, and that no

inference could be drawn from the alleged admission of ownership in the other Plea. He was entitled to file inconsistent Pleas.

It is difficult for counsel for appellee to find any justification for reference in appellants' brief to matters which are not brought out in the instant case, but which are based on something supposed to be contained in an entirely different record. He shall not, therefore, attempt to reply to the contention that is made that it will be found in the first record that no question was raised concerning the automobile in question being a "family purpose" car and as to what the appellee did or did not deny in the first trial of the case.

The refusal of the trial justice to permit one of the Counsel for appellants to testify as to admissions that former counsel for appellee was supposed to have made in the course of the first trial is not assigned as error and is not, therefore, worthy of consideration.

CONCLUSION

Appellants sought to recover damages from the appellee solely upon the "family purpose" doctrine, and alleged in the Declaration and offered proof tending to show that the appellee owned the automobile, permitted his wife to use the same, and that she was using it for her own pleasure and not on any business of the appellee.

It is respectfully urged that, even though they had alleged and proved that said automobile was purchased by appellee for the use and pleasure of the members of his family, and that his wife was using the said automobile on the day of the accident, with his express or implied permission, for her own pleasure and con-

venience, under the Virginia decisions they would not be entitled to recover. The learned Justice so construed the Virginia decisions when he directed the verdicts in favor of appellee, and in so doing he committed no error and his action should be affirmed.

Respectfully submitted,

HENRY I. QUINN,
Attorney for Appellee.